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ORIGINAL

September 24, 1998

FEDERAL EXPRESS

William K. Suter
Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

RE: Louis Jones, Jr. v. United States, No. 97-9361

Dear Mr. Suter: Supplemental

As directed by members of your office, I am hereby submitting the following supplemental authority for consideration by the Court with respect to the petition for writ of certiorari filed in the above-referenced matter:

> **Charles C. Boettcher, Comment, *Testing the Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591-98 (1994): United States v. Jones, 132 F.3d 232 (5th Cir. 1998)*, 29 Tex. Tech. L. Rev. 1043 (1998)**

This authority bears upon the first three questions presented in Mr. Jones's petition. As a convenience to the Court, I append a copy of this authority to this letter.

I have submitted the original and 10 copies of this letter and the appended supplemental authority for filing with the Court. **As I have been informed that this case is set for conference by the Court on Monday, September 28, 1998, I have sent these documents via Federal Express, overnight delivery.**

I have also mailed, via United States first-class mail, postage prepaid, a copy of the letter and authority to each of the persons listed below.

64 pp

Thanking you for your attention to this matter, I remain,

Respectfully yours,

Timothy Crooks

Timothy Crooks
Asst. Federal Public Defender and
Appellate Chief

Attachment

cc w/ encl:

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Texas Tech Law Review
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Comment

*1043 TESTING THE FEDERAL DEATH PENALTY ACT OF 1994, 18 U.S.C. §§ 3591-98 (1994): UNITED STATES V. JONES, 132 F.3D 232 (5TH CIR. 1998)

Charles C. Boettcher

*1044 "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." [FN1]

I. Introduction

On January 5, 1998, the United States Court of Appeals for the Fifth Circuit handed down United States v. Jones, the first federal appellate court *1045 opinion to construe the Federal Death Penalty Act of 1994 (FDPA). [FN2] In Jones, the defendant appealed the imposition of a death sentence pursuant to the FDPA following a conviction for "kidnapping with murder resulting" under section 1201 of the Federal Kidnapping Act. [FN3] The defendant raised two types of error on appeal: (1) constitutional challenges to the FDPA, and (2) challenges alleging arbitrary and capricious imposition of the death sentence due to confusion concerning the jury instructions and redundancy/duplication in the aggravating factors. [FN4] The Fifth Circuit addressed these points of error in a systematic and workmanlike manner, thereby providing a great deal of insight into the workings of the FDPA.

Although the Fifth Circuit's opinion is secured in longevity as a landmark decision in federal death penalty law, the court's opinion is suspect in many regards. The precedential value of the court's interpretation of the FDPA and its conclusions regarding the jury instructions and aggravating factors used in Jones is undermined by the court's failure to provide detailed analysis and crucial support. [FN5] As the first appellate court to review the provisions of the FDPA (only a handful of district courts had previously decided cases under the FDPA), [FN6] the Fifth Circuit broke ground for all federal *1046 courts. In so doing, however, the Fifth Circuit made many hasty conclusions with seemingly little support. [FN7] At times, the court avoided conducting a detailed statutory analysis. [FN8] The court simply made bare conclusions supported by attenuated, and sometimes incorrect, analysis of the FDPA. [FN9] Additionally, when faced with reviewing the decision of the district court by reconsidering the evidence, the Fifth Circuit seemed partial to affirming the sentence of death. [FN10] Therefore, the weighing fell in favor of the government. [FN11]

This note commences by examining the federal death penalty law prior to United States v. Jones. After reviewing the historical roots of the procedural protections embodied in the FDPA, the actual provisions of the statute are examined in great detail. Finally, with this background, this note analyzes the Fifth Circuit's opinion in United States v. Jones. II. History of Capital Punishment on the Federal Level

The United States has struggled with the issue of capital punishment throughout history. [FN12] From approximately 1930 to 1971, the states and the federal government executed 3,859 criminals. [FN13] However, the number of executions steadily declined during the latter years of this period, with only ten executions occurring from 1965 to 1971. [FN14] The federal government performed capital punishment for the last time in a 1963 hanging of an Iowa man convicted of murder and kidnapping. [FN15] By the time the United States Supreme

Court handed down its decision in Furman v. Georgia, [FN16] the federa *104' government had practically abandoned executions. [FN17] The federal govern-ment's move away from the imposition of capital punishment seemed to reflect growing public sentiment against capital punishment. [FN18] After the Court's 1972 opinion in Furman, the federal government completely abandoned the death penalty and refused to revive a federal death penalty scheme until 1988. [FN19]

A. The Broad Sweep of Furman

In 1972, the United States Supreme Court opinion in Furman v. Georgia ushered in an upheaval in capital punishment and death penalty provisions for both federal and state capital punishment law. [FN20] In Furman, three petitioners-one rapist from Georgia, one murderer from Georgia, and one rapist from Texas-challenged their respective states' death penalty statutes as violating the Eighth Amendment prohibition against cruel and unusual punishment. [FN21] The Court released a per curiam opinion, holding simply "that the imposition and carrying out of the death penalty in these cases constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." [FN22] Because the per curiam opinion merely reversed and remanded, the Court's holding seemed limited to the three cases before it. [FN23] If construed in such a light, the Court's holding in Furman would have only struck down the death penalty statutes in Georgia and Texas. [FN24] The holding, however, reached farther than just the statutes in Georgia and Texas.

*1048 The per curiam opinion in Furman was accompanied by nine separate non-joining opinions-five concurring and four dissenting. [FN25] The five Justice majority was further segmented into three separate camps: (1) Justices Stewart and White agreed that the imposition of the death penalty was arbitrary and capricious, (2) Justice Douglas focused more on the inconsistent application of the death penalty based on the personal attributes of the defendant, and (3) Justices Marshall and Brennan, writing the longest opinions for the Court, believed the death penalty to be unconstitutional in all circumstances. [FN26] Because Justices Marshall and Brennan opposed any imposition of the death penalty, Justices Stewart, White, and Douglas provided the pivotal voices for the Court.

In the shortest and most far-reaching opinion of the nine, Justice Stewart emphatically proclaimed the sentences to be " 'unusual' in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare." [FN27] He characterized the petitioner's death sentences as "cruel and unusual in the same way that being struck by lightning is cruel and unusual." [FN28] Justice Stewart declared the death penalty unconstitutional "under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." [FN29] Consequently, the opinion extended beyond the three cases before the Court. By condemning any statute or capital punishment scheme resembling those in Georgia and Texas, Justice Stewart's opinion implied that the death penalty statutes of other states, as well as the federal government, would be reviewed with the same scrutiny as that employed in Furman. [FN30] In essence, the Court invalidated all state and federal capital punishment procedures which presented a "substantial risk that death would be imposed in an arbitrary or capricious manner." [FN31] Because all state *1049 and federal statutes were thought to embody the risk identified in Furman, the Supreme Court's decision effectively emptied death rows by invalidating the death sentences of over 600 inmates awaiting execution. [FN32]

Responding to the dearth that Furman left behind, many states rushed to change their death penalty statutes. [FN33] The federal government, in turn, revised the Federal Aviation Act of 1958 by implementing new death penalty procedures, [FN34] and the Kidnapping Act by removing the death penalty provision altogether. [FN35] However, the remaining federal death penalty statutes were effectively abandoned as unconstitutional under Furman. [FN36] Due to their dormant nature, these federal death penalty statutes later acquired the fitting title of "zombie statutes." [FN37]

B. In the Wake of Furman

Four years after Furman, the Supreme Court in Gregg v. Georgia again faced a Georgia death penalty case-this

time the petitioner faced death for two counts of armed robbery and two counts of murder. [FN38] However, unlike the death sentence found unconstitutional in Furman, the death sentence a *1050 issue in Gregg arose under a new capital punishment scheme enacted by the Georgia Legislature in an effort to comply with the scope of Furman. [FN39] The new Georgia scheme embodied a two-stage procedure: "a guilt stage and a sentencing stage." [FN40] Although Georgia law still provided for death or life imprisonment for murder, the sentencing stage contained safeguards against arbitrary imposition of the death penalty. [FN41] At the outset, the new statute only allowed the death penalty to be imposed for six statutorily defined crimes. [FN42] In addition, the statute performed a narrowing function by requiring a finding beyond a reasonable doubt of at least one of the ten statutorily defined aggravating factors. [FN43] Further, the statute allowed the jury unlimited discretion to consider "non-statutory mitigating factors" and additional "non-statutory aggravating factors" before making the decision to impose death. [FN44]

Although these two functions seemed at odds, first narrowing the class and then permitting almost unfettered discretion, the process achieved a channeling of discretion that satisfied the Furman requirements. [FN45] In addition, the statute required an automatic appeal to the Georgia Supreme Court for any sentence of death. [FN46] Finally, the statute required the Georgia Supreme Court to ensure that: (1) passion or prejudice did not influence the decision, (2) sufficient evidence supported the finding of at least one statutory aggravating factor, and (3) the sentence was not disproportionate when compared to sentences in other similar cases. [FN47]

*1051 In the plurality opinion of Justices Stewart, Powell, and Stevens, the Court upheld both Georgia's new statutory death penalty provisions and the sentence against the defendant, Gregg. [FN48] The Court first found that the death penalty was not per se unconstitutional as a violation of the "cruel and unusual punishment" clause of the Eighth Amendment. [FN49] Next, the Supreme Court highlighted the important procedural safeguards embodied in the new Georgia death penalty statute, and the Court addressed the petitioner's generic attacks on the statute. [FN50] The Court focused on the bifurcated proceedings. [FN51] Additionally, the court highlighted the importance of ensuring that the jury was adequately informed of relevant information and provided with standards to guide its decision. [FN52] The Court concluded that the new Georgia sentencing procedures, by contrast to the procedures reviewed in Furman, focused the jury's attention to the particular crime and the particular defendant. [FN53] The Court held that the jury's discretion was sufficiently directed and limited in order to minimize arbitrary and capricious action by the jury, thereby satisfying Furman. [FN54] Consequently, the Court affirmed the defendant's death sentence pursuant to the statute. [FN55]

On the same day as the decision in Gregg, the Court decided four companion cases: Proffitt v. Florida, [FN56] Jurek v. Texas, [FN57] Woodson v. North Carolina, [FN58] and Roberts v. Louisiana. [FN59] The decisions of the Court were given by the same plurality as in Gregg. [FN60]

In Proffitt, the Court upheld Florida's death penalty scheme, which was similar to Gregg in all respects except that the jury's verdict in the sentencing hearing was only advisory with the trial judge making the ultimate decision. [FN61] The Court in Jurek upheld Texas' distinct capital punishment scheme, whicl *1052 statutorily defined a separate offense of capital murder, and required the jury to answer three questions affirmatively before the death penalty could be enforced. [FN62] However, the Court rejected the death penalty schemes in Woodson and Roberts because North Carolina and Louisiana had created capital punishment schemes that provided mandatory death sentences for certain murder offenses, thereby denying the convicted defendant the opportunity to put on character evidence and receive an "individualized sentencing." [FN63] These procedures stood in sharp contrast to the procedures at issue in Gregg, Proffitt, and Jurek, which compelled the jury to consider the circumstances of the crime and the characteristics of the criminal. [FN64] Although the Court in Woodson recognized that other crimes receiving mandatory sentences were constitutionally permissible, the Court insightfully noted that "death is qualitatively different." [FN65] So different, in fact, that mandatory sentences of death should be viewed as unconstitutional. [FN66]

Through Gregg and its brethren in the wake of Furman, the Court provided a good road-map establishing what types of statutory procedures, promulgated by the states and federal government, satisfy the Eighth Amendment's

prohibition against cruel and unusual punishment. First, mandatory death sentencing is constitutionally impermissible. [FN67] Second, imposition of the death penalty cannot be done arbitrarily, capriciously, or in a wanton or freakish way. [FN68] Third, sentencing should be carried out by th *105 jury, but a judge could make the decision as long as the jury played a role. [FN69] Fourth, and arguably most important, the discretion allocated to the jury should be channeled while allowing for an individualized sentencing at the same time. [FN70] In essence, the jury should look at both the circumstances of the crime and the individual characteristics/record of the criminal defendant. [FN71] Fifth, the jury should be adequately informed of all necessary information and be guided in the decision-making process. [FN72] Sixth, a bifurcated trial with separate guilt and sentencing stages should be employed. [FN73] Finally, in order to satisfy the Eighth Amendment, "meaningful appellate review" must be provided by the highest appellate court in the jurisdiction; however, an automatic right to appeal is not necessarily required. [FN74]

The Court primarily looked to Georgia's procedures as a guide to compliance with the standards of Furman. [FN75] However, the Court noted that Georgia's procedures were not the only permissible procedures under Furman and that similar procedures would not automatically satisfy the concerns of Furman. [FN76] Thereby, the Court established a road-map, but seemingly reserved the right to review each jurisdiction's procedures in their totality to determine if the procedures complied with the mandates of Furman.

C. The Labored Political Push Toward a Federal Death Penalty Scheme

The federal government, unlike most of the states, took its time in enacting new legislation responding to the Supreme Court's death penalty jurisprudence. [FN77] This slow response was attributable, at least in part, to the Democratic Party's control of both houses of Congress as well as the Presidency from 1976- 80. [FN78] The Democratic Party traditionally expressed greater opposition to the death penalty than the Republican Party. [FN79] However, pro-death penalty political strength began to grow from 1980 to 1992 unde *105 the strong Republican Presidential leadership of Ronald Reagan and George Bush. [FN80] While the Democratic Party controlled Congress and the Republican Party controlled the Presidency, the compromising nature of politics coupled Congress and the President in an effort to bring back a federal death penalty scheme. [FN81]

The political change of the 1980's, most notably the re-election of Republican President Ronald Reagan with a political mandate for his second term, ushered in a new wave of anti-crime legislation. [FN82] During this time, the enactment of the Sentencing Reform Act of 1984 [FN83] triggered an increased debate over the merits of the death penalty and the possible implementation of the death penalty through revised statutory decrees consistent with Furman. [FN84] Although the Sentencing Reform Act passed, the political pressure for a federal death penalty scheme was silently quashed and left for another day. [FN85]

In the years to follow, the push for a federal capital punishment scheme gained minimal ground with the passing of the Anti-Drug Abuse & Death Penalty Act of 1988 (Drug Kingpin Act). [FN86] This Act added the death penalty for a very narrow realm of cases in which murder resulted during a drug related offense. [FN87] Although nicknamed the Drug Kingpin Act, the nickname is deceiving, as implementation of the death penalty is not limited solely to "drug kingpins." [FN88] Under the Act, anyone involved in a drug enterprise, nc *105 just the kingpins, could receive the death penalty for murder resulting from a drug related offense. [FN89] However, to receive the death penalty, the murderer would still have to act with "intention," and numerous procedures helped meet the demands of Furman. [FN90]

The push for a federal death penalty scheme received heightened support when George Bush became President of the United States in 1989. [FN91] In 1989, Senator Strom Thurmond introduced a bill entitled the Federal Death Penalty Act of 1989 [FN92] as a sub-chapter of his bill entitled the "Comprehensive Violent Crime Control Act of 1989." [FN93] However, with the Democratic party in control of both houses of Congress, the political climate halted the passage of a federal death penalty act as all-inclusive as Senator Thurmond's proposal. [FN94] Year after year, Senator Strom Thurmond reintroduced the Federal Death Penalty Act. [FN95] However, Senator Thurmond was consistently disappointed. [FN96]

*1056 Democrats quickly became equally vocal in the push for a federal death penalty scheme. [FN97] Exemplifying once again the compromising nature of politics, Republican Senator Thurmond and Democratic Senator Biden joined together in 1991 to propose a bi-partisan version of the death penalty legislation first proposed in 1989. [FN98] While this proposal also failed to pass, the apparent elimination of party politics helped to further the push toward a federal death penalty scheme. The election of Bill Clinton as President in 1992 seemed to put the crime issue in the Democrats hands. [FN99] While purporting to be "tough on crime," however, President Clinton failed to pass a crime bill in the first two years of his term. [FN100]

Due to the nature of politics, the Republican party ended-up switching sides and fighting against the bill. [FN101] Still, it did not take long for Congress to pass the Violent Crime Control and Law Enforcement Act of 1993 and the Federal Death Penalty Act of 1994 as an internal sub-chapter of that Act. [FN102] While the Democratic Party ended up taking the credit, Republicans were equally pleased with the new federal death penalty scheme. [FN103] In fact, the FDPA was the most heavily publicized portion of the Crime Control Act, and arguably one of the most instrumental to the bill's passage. [FN104]

*1057 The Federal Death Penalty Act of 1994 was a revolution for federal capital punishment. For the first time, the federal government broadly addressed the constitutional demands of Furman for all crimes punishable by death under federal law. [FN105] The Federal Death Penalty Act of 1994, in effect, created a procedural/substantive dichotomy among the federal statutes. The FDPA represented the procedural side of the death penalty scheme, while the ability to qualify a criminal for the death penalty was left to scattered substantive provisions in Title 18 of the United States Code-some in existence prior to the FDPA and others enacted by the FDPA. [FN106] All told, the FDPA applied new procedures to around sixty substantive death eligible offenses. [FN107] The FDPA marked a huge expansion of federal death penalty law by any standard of measurement. For the most part, the FDPA provided the same procedural protections as the Drug Kingpin Act, [FN108] only on a broader scale because of the sixty death eligible crimes subject to the procedures of the FDPA. [FN109]

III. A Look at the Federal Death Penalty Act of 1994

While the Court in Gregg warned against interpreting its opinion as suggesting that the procedures present in Georgia's statute were the only procedures that satisfy the requirements of Furman, the Court also warned that a sentencing scheme designed along the lines of Georgia's statute in Gregg would not automatically satisfy the constitutional concerns of Furman. [FN110] Nonetheless, the FDPA seems to be closely modeled after the Georgia statute in Gregg. [FN111] On the whole, however, the FDPA goes abov *1058 and beyond the requirements of the Georgia death penalty statute. [FN112] However, some areas of the FDPA have been challenged as falling short of the requirements outlined by the Court in Furman, Gregg, and more recent Supreme Court death penalty jurisprudence. [FN113]

A. Death Eligible Crimes

1. The Crimes

It has been said that the FDPA [FN114] created over sixty new death eligible crimes. [FN115] However, the FDPA did not create sixty death eligible crimes, but actually created only around twenty new death eligible crimes. [FN116] Two of the crimes created by the FDPA are codified in the main portion of the statute. [FN117] The other eighteen or more crimes created by the FDPA are codified in scattered sections of Title 18 of the United States Code, presumably to place them within the category of the Code relating to the substantive offense being made death eligible. [FN118]

The remainder of thesixty purported crimes were not actually created by the FDPA. The FDPA merely applies its procedural provisions to these crimes, making them death eligible. [FN119] This incorporation is achieved through broad language in section 3591(a)(2), making the procedural provision *1059 applicable to "any other offense for which a sentence of death is provided." [FN120] Approximately seventeen of these referenced crimes

were already eligible for imposition of the death penalty prior to the enactment of the FDPA. [FN121] The statutes which make these crimes eligible for death, appropriately referred to as "zombie statutes" because of their dormant nature after Furman, [FN122] were effectively revived from their statutory "Never- Never Land" by the FDPA. [FN123] Further, at least eight other crimes that existed prior to the FDPA are now death penalty eligible. [FN124]

Although the FDPA did make some new crimes death eligible, its most impacting effect on federal death penalty jurisprudence is its codification of "procedures for the imposition of the death penalty" which "comport[] with the constitutional requirements outlined by the Supreme Court." [FN125] All told, the FDPA's procedural provisions apply to over forty-five crimes. [FN126]

*1060 The vast array of crimes eligible for the death penalty under the FDPA can be divided into three arenas: (1) crimes in which a person is intentionally killed, (2) crimes in which a dangerous activity results in a person's death, and (3) non-homicide related crimes. [FN127] The first arena encompasses over fourteen crimes, and the second arena holds over sixteen crimes. [FN128] The third arena, by contrast, contains only four death-eligible crimes: treason; [FN129] espionage; [FN130] continuing criminal enterprise- related drug trafficking involving large quantities of drugs; [FN131] and a drug kingpin's acts toward obstructing an investigation of a "continuing criminal enterprise" and involving an order or personal attempt to kill a "public officer, juror, witness, or member[] of the family or household of such a person." [FN132]

2. Constitutionality of the Penalties for Non-Homicide Crimes

The last arena of crimes poses the most interesting constitutional questions. Prior to the passage of the FDPA, both treason and espionage qualified as death-eligible crimes. [FN133] Although at least one commentator felt that these crimes were enforceable as codified, [FN134] the newly added procedural safeguards help to ensure that the death penalty for these two crimes will sustain constitutional scrutiny. The imposition of a death penalty for treason and espionage is seemingly constitutional partially because of the historical death-eligibility of these crimes. [FN135] The two non-homicide death-eligible drug *1061 crimes, however, have less of a chance of passing constitutional muster since they are not as rooted in historical precedent. [FN136]

Initially, these death-eligible drug crimes fly in the face of Coker v. Georgia. [FN137] Although the holding of Coker implied that any sentence of death for a non-homicide offense would be unconstitutional, [FN138] treason and espionage are still viewed to be exceptions to this holding because of their historical precedent and significant impact on society. [FN139] By seeking to classify drug trafficking on the same par as murder, treason, and espionage in its significant injury to society, Congress arguably intended to bypass this constitutional hurdle. [FN140] Possibly to bolster the constitutional validity of the two non-homicide death-eligible drug crimes, Congress included a specific list of nine aggravating factors for these crimes. [FN141] By providing this specific list of aggravating factors for the drug crimes, Congress seems to have gone to great lengths to ensure that the class of eligible defendants is sufficiently narrow to pass constitutional muster. After Coker, no state has sentenced a defendant to death for a non-homicide related crime. [FN142] Therefore, Congress is on its own in testing the constitutional waters of the death penalty for drug-related crimes, treason, and espionage.

While both non-homicide drug offenses pose general constitutional problems under Coker, one of the crimes poses additional constitutional *1062 problems. The validity of a sentence of death for drug trafficking defined in 18 U.S.C. § 3591(b)(1) is additionally suspect due to problems in application. [FN143] Because the statute applies generally to dealers of "large quantities of drugs," [FN144] the interpretation of what qualifies as a large quantity of drugs could lead to violations of the equal protection clause and substantive due process. [FN145] The constitutional problems arise from a disparate treatment of powder and crack cocaine under federal criminal law. [FN146] Although federal criminal law views 300 kilograms of powder cocaine as a large quantity, merely three kilograms of crack cocaine qualifies as a large quantity. [FN147] With the possibility of disparate results, death-eligibility of drug trafficking as defined in section 3591(b)(1) is even less likely to pass review under the United States Constitution.

While many federal crimes are now death eligible, the initial step toward a sentence of death remains in the hands of the prosecutor for the government. [FN148] The prosecutor may choose either to seek the death penalty or forego the possibility of imposing a sentence of death. [FN149] If the prosecutor chooses to seek the death penalty, the FDPA requires the prosecutor to make an outward manifestation of the government's intent to seek the death penalty. [FN150]

B. Intention to Seek the Death Penalty

Full discretion is vested in the prosecutor, in light of the circumstances of the case, to decide whether to seek the death penalty for a case subject to the procedures of the FDPA. [FN151] Exceeding the call of Gregg, the FDPA requires the prosecutor to serve a notice of intention to seek the death penalty upon the defendant within a "reasonable time" before the trial or before acceptance of a plea of guilty. [FN152] This "reasonable time" language has not been interpreted by any federal court, under either the Drug Kingpin Act or the FDPA. [FN153] In light of the fact that the notice requirement exceeds the *1063 procedures of the Georgia statute in Gregg, [FN154] a defendant would likely achieve little success in challenging a "late notice" on constitutional grounds. Courts are likely to allow any notice submitted before trial to stand as good notice, but if it is submitted after trial, courts would probably find a violation of the statute. [FN155] This, however, raises additional questions as to how to deal with a statutory violation of the FDPA. [FN156]

The purpose of the notice of intent to seek the death penalty is two- fold: (1) to put the defendant on notice, and (2) to convey information to the defendant. [FN157] The notice must include a statement that the Government has found the circumstances of the crime to justify a sentence of death if the defendant were convicted, [FN158] and the notice must list the aggravating factor(s) the government will seek to prove. [FN159] While the notification requirement of the FDPA requires the government to list circumstances justifying a death sentence, this requirement does not appear to add anything more to the general notice requirement of the Drug Kingpin Act. [FN160] The second purpose of the notice is crucial, however. By giving the defendant notice of what aggravating factors the government will seek to prove, the defendant is allowed an opportunity to challenge the aggravating factors and to receive the district court's pre-trial judgment as to which aggravating factors are constitutionally valid. [FN161] Thereby, potential prejudice at the sentencing *1064 hearing can be avoided. Although the defendant is entitled to notice of these aggravating factors, at least one district court has held that the notice cannot be compelled until the government has decided to issue its intent to seek the death penalty. [FN162]

Representing a significant difference from the Drug Kingpin Act, the FDPA specifically allows the aggravating factors to include the effect of the criminal act on the victim and the victim's family. [FN163] In addition, victim impact statements are specifically authorized. [FN164]

After issuing its notice of intention to seek the death penalty, the government proceeds with the trial of the defendant. [FN165] As with the Drug Kingpin Act, the court may amend the notice upon a showing of "good cause." [FN166] Presumably, the notice can be amended at any time. [FN167] If the government receives a conviction, the defendant is entitled to a separate sentencing hearing. [FN168]

C. Sentencing Hearing

Section 3593, entitled "Special hearing to determine whether a sentence of death is justified" serves as the heart of the FDPA. [FN169] That section imposes two requirements prior to the sentencing hearing. [FN170] First, the notice of intention to seek the death penalty must have been properly served. [FN171] Second, the defendant must have been found guilty of a crime or pled guilty to a crime governed by the FDPA. [FN172] After satisfying these prerequisites, the jury which determined the defendant's guilt (or a new jury under the proper circumstances) [FN173] shall be impaneled at the sentencing hearing. [FN174] This procedure creates a bifurcated proceeding for federal death penalty cases, *1065 similar to the Georgia statutory scheme involved in Gregg. [FN175] While the FDPA provides no new procedural restraints at the trial stage, the FDPA provides numerous procedures for the sentencing hearing. [FN176]

1. Statutory Aggravating Factors

At the sentencing hearing, the FDPA vests ultimate discretion with the jury to determine whether the convicted defendant will be sentenced to death. [FN177] The district court cannot alter the jury's decision. [FN178] Because a jury ultimately decides imposition of the death penalty, Furman and its progeny require that the jury's discretion be guided and that the jury be informed of the circumstances of the crime as well as the record and characteristics of the individual. [FN179] The FDPA provides this guidance through detailed procedures with respect to aggravating and mitigating factors. [FN180]

a. Threshold Requirement of Intent

With the exception of the non-homicide offenses, [FN181] the FDPA initially guides the jury's discretion by narrowing the class of death eligible criminals to certain statutory offenses where someone was intentionally killed or death resulted as the product of a dangerous activity. [FN182] To reinforce this purpose, the FDPA requires that the jury make a unanimous threshold finding, beyond a reasonable doubt, of at least one of four statutorily defined aggravating factors. [FN183] The four factors are essentially divided into two groups, with two factors in each group. [FN184] The first group of factors apply to intentional crimes, and the two factors require either a finding of an intentional killing or intentional infliction of serious bodily injury resulting in death. [FN185] The second group of factors apply to those crimes involving a dangerous activity resulting in death, and the two factors require either an assumption of the risk of death or creation of a "grave risk." [FN186] Although these four factors can be separated *1066 into the two aforementioned groups, the jury is asked only to find one aggravating factor from among the list of four. [FN187]

b. Additional Narrowing Function

In a continuation of this narrowing function, the jury must also find at least one statutorily defined aggravating factor from a second list. [FN188] In order to eliminate jury confusion resulting from the introduction of irrelevant factors from the list, the government must choose the statutory aggravating factors it will submit to the jury. [FN189] As the government is limited to the statutory aggravating factors appearing in its notice of intent to seek the death penalty, the government must firmly decide which factors it wishes to pursue before issuing its notice. [FN190] In choosing factors, the government is limited to one of three lists of aggravating factors in section 3592. [FN191] The lists are categorized according to the type of crime involved, and the government must select the aggravating factors from the appropriate list. [FN192] There are sixteen factors for homicide offenses, [FN193] three factors for espionage or treason, [FN194] and eight factors for the two drug-related offenses defined in section 3591. [FN195]

*1067 c. The Drug Kingpin Act's Aggravating Factors-In Contrast

In contrast to the clarity of these two narrowing stages of the FDPA, the Drug Kingpin Act's two narrowing stages statutorily overlap. In fact, the Drug Kingpin Act seems to provide for three narrowing stages. [FN196] First, in order to even qualify for death, the defendant must meet a special intent requirement. [FN197] Second, the jury is required to find one statutory aggravating factor from among a list of four possible factors referring to the defendant's intent. [FN198] These two stages overlap each other to accomplish exactly the same narrowing as the first narrowing stage of the FDPA. [FN199] Third, the jury is required to find at least one statutory aggravating factor from among the remaining list of eleven aggravating factors. [FN200] As with the FDPA, however, the Drug Kingpin Act requires the jury to be unanimous in finding each aggravating factor beyond a reasonable doubt. [FN201]

In addition to the statutory aggravating factors of the FDPA which successfully satisfy the narrowing requirement, the government can also create other non-statutory aggravating factors to submit to the jury.

*1068 2. Non-Statutory Aggravating Factors

The FDPA allows the government to create aggravating factors specifically geared to the particular facts of the case. [FN202] As with the statutory aggravating factors, these aggravating factors must be listed in the notice of intent to seek the death penalty. [FN203] While the jury does not need to find any non-statutory aggravating factor(s) to proceed with the imposition of death, the government often submits them in its intent to seek the death penalty anyway. The government submits these factors in order to aide the jury in weighing what the government believes to be the relevant factors in favor of a death sentence. Although the government can gain an advantage by using non- statutory aggravating factors, these factors are often the basis of constitutional challenges. Defendants have challenged the prosecutor's discretion as an improper delegation of legislative power by Congress. [FN204] Defendants have also challenged both statutory and non-statutory aggravating factors for being too vague [FN205] and too duplicative in violation of due process. [FN206]

Although challenges of improper delegation of authority have been uniformly struck down, [FN207] the vagueness and duplication challenges have enjoyed some success among the district courts and appellate courts interpreting the Drug Kingpin Act. [FN208] Challenges concerning improper vagueness and duplication are equally applicable to statutory aggravating factors. [FN209] However, the statutory aggravating factors have less chance of being found vague or duplicative because Congress will usually take great care when drafting such legislation. Additionally, judicial deference to the legislature increases the burden on a defendant alleging vagueness and duplication of statutory aggravating factors. [FN210] In contrast, non-statutor *106 aggravating factors are created by a prosecutor who has little experience with legislative drafting. [FN211] Therefore, the non-statutory aggravating factors should receive less judicial deference because of the significant danger of vagueness and duplication.

With the statutory and non-statutory aggravating factors, the FDPA ensures compliance with the requirement's of the Court in Gregg-that the jury's discretion be focused on the particular crime involved. [FN212] By requiring the jury to make a finding of at least one statutory aggravating factor regarding intent and at least one statutory aggravating factor from a crime- specific list of aggravating factors, the FDPA performs a narrowing of the pool of death-eligible criminals and ensures that each criminal is evaluated on the basis of his own, individual crime. [FN213] In tandem with the narrowing requirement, the Court in Gregg also required that the jury's discretion be focused on the record and characteristics of the particular defendant in the particular case. [FN214] While some of the aggravating factors work to achieve this goal, [FN215] the bulk of this requirement is satisfied by the defendant in mitigation of his crime. [FN216] To this end, the FDPA allows the defendant to submit mitigating factors to the jury at the sentencing hearing. [FN217]

3. Mitigating Factors

While the government bears the responsibility of submitting aggravating factors, the defendant has the responsibility to submit mitigating factors. [FN218] The FDPA statutorily provides for seven mitigating factors. [FN219] In addition to *1070 the seven statutorily defined factors, the FDPA also provides for the admission of any other factor in the "defendant's background, record, or character" and any circumstances of the offense which help to mitigate against an imposition of death. [FN220] In contrast to the government's responsibility to include the aggravating factors in the notice of intent to seek the death penalty, [FN221] the defendant bears no responsibility to notify the government of which mitigating factors the defendant will attempt to prove at the sentencing hearing. [FN222]

Once the government has submitted its aggravating factors and the defendant has submitted its mitigating factors, the two parties will put on an evidentiary case at the sentencing hearing. [FN223] At this phase, the parties will engage in an evidentiary battle. [FN224] The parties will attempt to prove their own factors while disproving their opponent's factors. [FN225] Each party's evidence is ultimately intended to sway the jury on its decision for or against death. [FN226]

4. Rules of Evidence, Procedure, & Burdens of Proof

The Federal Rules of Evidence are completely inapplicable in a sentencing hearing pursuant to the FDPA. [FN227] The FDPA establishes its own rules of evidence. [FN228] At the outset, the government and the defendant may provide any relevant information in regard to the sentencing hearing. [FN229] Elaborating on this general provision, the FDPA specifically allows the government to provide any relevant information as t ***1071** aggravating factors, and the statute also allows the defendant to provide any relevant information as to mitigating factors. [FN230] Relevant information can be excluded under the FDPA only if its "probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." [FN231]

Thus, while the Federal Rules of Evidence do not govern the sentencing hearing, the district court's ability to exclude relevant evidence is akin to the standard outlined in Rule 403 of the Federal Rules of Evidence. [FN232] However, the standard enunciated in the FDPA differs quite significantly from the standard of Rule 403 due to the exclusion of "substantially" from the version codified in the FDPA. [FN233] Rule 403 requires the probative value to be "substantially outweighed" by the danger of unfair prejudice. [FN234] As the Drug Kingpin Act basically re-codified the language of Rule 403, the Drug Kingpin Act's exclusionary standard also required "substantial" outweighing. [FN235] In contrast, the standard enunciated in the FDPA requires only that the probative value be "outweighed" by the danger of unfair prejudice. [FN236] Therefore, the FDPA's standard seems to allow a greater chance for evidence to be excluded based on unfair prejudice, confusing the issues, or misleading the jury. [FN237]

The procedure and burden of proof for the sentencing hearing is similar to a trial. The FDPA provides that the government begins the argument, and the defendant replies. [FN238] The government then rebuts. [FN239] Moreover, the government and the defendant will be permitted to rebut any information given at the sentencing hearing, and the government and defendant will be given "fair opportunity" to develop their arguments concerning the aggravating and mitigating factors. [FN240]

In addition, the FDPA logically allocates the burden of proof over aggravating and mitigating factors to the party who has the greatest interest in each factor. The government carries the burden of proof for the aggravating factors, and the defendant carries the burden of proof for the mitigating factors. [FN241] The FDPA makes a crucial distinction between the burden of proof required for the government and the burden the defendar ***1072** must carry. [FN242] While the defendant is only required to establish the mitigating factors by a preponderance of the evidence as to any one juror, the government is required to establish each aggravating factor beyond a reasonable doubt as to all of the jurors. [FN243]

At the close of the sentencing hearing, the jury is faced with the decision of whether or not to vote for a sentence of death. [FN244] If the jury finds at least one aggravating factor from each of the two separate lists of statutory aggravating factors, the narrowing function required by Furman is satisfied. [FN245] In addition, because the FDPA requires that the jury be directed to both the circumstances of the crime as well as the characteristics and record of the defendant, through the presentation of aggravating and mitigating factors, the requirement of an "individualized sentence" is also satisfied. [FN246] After the evidence is presented by the parties at the sentencing hearing, the jury will be asked to weigh the evidence and decide whether the defendant should be put to death. [FN247]

D. Weighing in on Death

As far as death penalty statutes are concerned, the FDPA is considered a weighing statute. [FN248] This means that jurors are required to weigh the aggravating and the mitigating factors. [FN249] In addition, the weighing scheme of the FDPA is an individual weighing performed separately by each juror. [FN250] Further, the FDPA allows an individual determination as to mitigating factors, but requires a unanimous determination as to aggravating factors. [FN251]

Consequently, under the FDPA's statutory scheme, each juror must weigh the aggravating factors found beyond a reasonable doubt by a unanimous decision of the jury against the mitigating factors he or she found to exist by a

preponderance of the evidence. [FN252] Although the jurors are required to record their votes with respect to each aggravating and mitigating factor as special findings of the jury, [FN253] this procedure seems to be more for ***1073** form than for substance. Because each juror weighs different mitigating factors against the aggravating factors found by the jury as a whole, [FN254] the jury's decision is really the result of twelve independent viewpoints being coalesced together after an individual weighing of aggravating and mitigating factors. [FN255]

Although each juror is allowed to disregard the other jurors' findings when making a decision, [FN256] the FDPA represents a marked improvement over the Drug Kingpin Act. The Drug Kingpin Act contains a clause resembling an escape hatch for the jury. [FN257] The clause effectively allows the jury to disregard all of its determinations with regard to the aggravating and mitigating factors and refuse to impose a sentence of death. [FN258] The Drug Kingpin Act, therefore, allows the jury to make an independent, unfettered decision despite the Act's detailed procedures. [FN259] Seemingly weary of the possible problems of "arbitrary and capricious" imposition of the death penalty due to this clause's vesting of unfettered discretion with the jury, Congress excluded this language from the FDPA. [FN260] Nonetheless, the FDPA still allows each juror to individually weigh the aggravating and mitigating factors; therefore, the FDPA provides almost as much discretion as the Drug Kingpin Act.

While the FDPA is a weighing statute, it is not a quantitative weighing statute. [FN261] Jurors are not forced to vote for death if the number of aggravating factors is greater than the number of mitigating factors. [FN262] Practically speaking, however, piling up the factors on one side of the scale could influence the jury's decision. [FN263] Jurors might impliedly assess some quantitative level to each factor when performing the weighing. [FN264]

***1074** The accumulation of factors on either side of the equation can only serve to tip the scales of justice to the more heavily weighted side. [FN265] If the aggravating factors outweigh the mitigating factors, the defendant is likely to challenge the aggravating factors as vague or duplicative in an effort to show skewing of the weighing process. [FN266] If the appellate court finds an invalid aggravating factor(s), that court must decide how to address the improper balance created by the invalid aggravating factor(s). Concerning the type of review to employ and whether reversal and remand is warranted, a strong polar division exists between the Tenth Circuit and Fourth Circuit. [FN267]

1. Tenth Circuit, United States v. McCullah: Reweighing at the Trial Level

In United States v. McCullah, the United States Court of Appeals for the Tenth Circuit decided that duplication and/or overlapping of aggravating factors warranted a reversal and remand. [FN268] In the decision, the Tenth Circuit found that overlapping of aggravating factors occurred in two separate instances. [FN269] In the first instance, a statutory aggravating factor and a non-statutory aggravating factor were found to be duplicative. [FN270] In the second instance, two statutory aggravating factors were found to be duplicative. [FN271] The statutory aggravating factor at section 848(n)(1)(C), that the defendant " 'intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim which resulted in death of the victim,"' was common to both instances. [FN272]

In the first instance, section 848(n)(1)(C) was overlapped with a non- statutory aggravating factor that simply stated that the defendant had " 'committed the offenses as to which he [was] charged in the indictment.' " [FN273] Because the offense charged in the indictment required a finding that the defendant be a person who "did intentionally kill . . . or counsel, command, induce, procure, or cause the intentional killing of an individual, and such killing did result," the two factors were found to be too duplicative. [FN274] Therefore, the court held that unconstitutional overlapping and duplication resulted from the prosecutor's creation of a non- statutory aggravating factor ***1075** that was almost identical to an aggravating factor provided by Congress. [FN275]

In the second instance, section 848(n)(1)(C) was overlapped with another statutory aggravating factor from the same section of the Drug Kingpin Act- section 848(n)(1). [FN276] Section 848(n)(1)(D) provides that the

defendant "intentionally engaged in conduct which . . . the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; . . . and resulted in the death of the victim." [FN277] The Tenth Circuit found the use of both sections 848(n)(1)(C) and 848(n)(1)(D) to be duplicative, even though it noted that they were not absolutely identical. [FN278]

The Tenth Circuit relied on the Supreme Court opinion in Stringer v. Black for the proposition that overlapping and duplication created a double counting effect. [FN279] The court also relied on Stringer for the proposition that under a weighing scheme, like the schemes in the Drug Kingpin Act and the FDPA, double counting "create[d] the risk that the death sentence [would] be imposed arbitrarily and thus, unconstitutionally." [FN280] While the Tenth Circuit realized that the Drug Kingpin Act's weighing scheme did not require the jury to find for death if the number of aggravating factors outweighed the number of mitigating factors, the court still found that a qualitative value was implicitly placed on each factor by the jury. [FN281] The court stated, "When the sentencing body is asked to weigh a factor twice in its decision, a reviewing court cannot 'assume it would have made no difference if the thumb had been removed from death's side of the scale.' " [FN282]

Finally, the Tenth Circuit concluded that reversal and remand was necessary in order to allow a new jury to reweigh the aggravating factors with the mitigating factors. [FN283] Stringer provided that the appellate court could either use harmless-error analysis, reweigh the factors itself, or allow the trial court to reweigh the factors. [FN284] The Tenth Circuit concluded that the overlapping and duplication required reweighing, and remanded the case-implying that the reweighing was best suited to the trial court level. [FN285] The Tenth Circuit's approach in McCullah is starkly contrasted with the approach of the Fourth Circuit in United States v. Tipton.

***1076** 2. Fourth Circuit, United States v. Tipton: Harmless Error Review

Five months after the decision in McCullah, the United States Court of Appeals for the Fourth Circuit faced a similar challenge. [FN286] In United States v. Tipton, three petitioners raised challenges to the imposition of their death sentences pursuant to the Drug Kingpin Act. [FN287] The petitioners' challenges revolved around the constitutional validity of four statutory aggravating factors located at section 848(n)(1) of the Drug Kingpin Act-some of the same statutory aggravating factors at issue in McCullah. [FN288] Addressing the defendants' challenge of overlapping and duplicative statutory aggravating factors, the Fourth Circuit found error but did not reverse or remand because the Fourth Circuit found the error to be harmless. [FN289]

The district court allowed the jury to choose more than one of the four factors in section 848(n)(1). [FN290] The jury did, in fact, find all four of the factors listed in section 848(n)(1). [FN291] The Fourth Circuit concluded that Congress did not intend for all four of the factors in section 848(n)(1) to be found at the same time. [FN292] Therefore, the Fourth Circuit held that the district court erred in allowing the jury to choose more than one of the factors in section 848(n)(1). [FN293]

Like the Tenth Circuit in McCullah, the Fourth Circuit relied on Stringer for the proposition that overlapping and duplication runs a risk of skewing the weighing process in favor of the death penalty. [FN294] Initially acknowledging that the Tenth Circuit in McCullah correctly held that error had resulted from the duplicative factors, the Fourth Circuit criticized the Tenth Circuit's opinion for not conducting harmless error review as Stringer allowed. [FN295] The court found guidance in the Supreme Court's standard for harmless error review ***1077** enunciated in Clemons v. Mississippi. [FN296] The Clemons standard provided that the court could find "harmlessness" in the error if convinced that the jury would have recommended the same sentence of death absent the erroneous instruction of the district court. [FN297]

Employing the harmless error review of Clemons, the Fourth Circuit found the district court's erroneous instructions to be harmless. [FN298] Initially, the Fourth Circuit deduced that the jury's finding of all four sub-factors in section 848(n)(1) necessarily meant that the jury relied most on the factor with the highest moral culpability-section 848(n)(1)(A)-that the defendant "intentionally killed the victim." [FN299] Next, the court hypothesized that had the jury been properly instructed, it would have relied on section 848(n)(1)(A) as the sole

basis for its section 848(n)(1) threshold finding. [FN300] Finally, the court concluded that the jury would not have afforded the one factor any less weight than the four factors were afforded together. [FN301]

In making this final jump, the Fourth Circuit proposed several reasons for concluding that the error was harmless. [FN302] First, the court felt that the factor in section 848(n)(1)(A) necessarily subsumed the other three factors in section 848(n)(1) because it represented the highest degree of moral culpability. [FN303] The district court's jury instructions provided the Fourth Circuit with another reason to conclude that the error was harmless. [FN304] The court found that the district court's instructions properly informed the jury that no quantitative value should be assessed to individual factors. [FN305] Further, the Fourth Circuit found that the instructions properly informed the jury that the three other factors in section 848(n)(1) were "lesser-included" factors of the factor in section 848(n)(1)(A). [FN306]

The final and most important reason the Fourth Circuit found harmless error was that the jury actually distinguished between the moral culpability of the defendants when recommending sentences of death. [FN307] At the trial and sentencing hearing, the jury heard facts regarding a broad conspiracy among numerous defendants, but the jury only imposed a death sentence for those ***1078** defendants either found to be the "actual killer or . . . physically present as an active participant in the killing." [FN308] Therefore, the Fourth Circuit found that "whatever misapprehensions the jury may have received from the court's allowance of cumulative findings of [848(n)(1)] circumstances, the jury properly accorded the weight it should have to the [848(n)(1)(A)] circumstance." [FN309]

The Fourth Circuit's analysis here was partially flawed. The fact that the jury actually recommended death for only those defendants who were, in the eyes of the Fourth Circuit, the most morally culpable of the group of defendants does not somehow preclude the possibility that the jury allocated too much weight to the three extra statutory aggravating factors when it recommended the death sentence for those defendants. Arguably, the Fourth Circuit in Tipton placed more emphasis on the defendant's moral culpability and less emphasis on the improper inclusion of extra aggravating factors in the jury's weighing process. Irrespective of whether the Fourth Circuit's opinion is flawed, the Fourth Circuit's opinion in Tipton, finding harmless error, is directly in contrast with the error analysis performed by the Tenth Circuit in McCullah, finding error, and reversing and remanding for reweighing at the trial court level.

E. The Decision

Although the jurors individually weigh the aggravating factors against the mitigating factors, the FDPA requires the jury-as a whole-to make the final determination of whether to impose a sentence of death. [FN310] The jury can vote for death, life imprisonment without parole, or some other lesser sentence authorized by law. [FN311] The FDPA requires the jury's vote to be unanimous. [FN312] If the jury votes for death or life imprisonment, the court is required to impose the sentence accordingly. [FN313] Furthermore, if the jury votes for "some other lesser sentence," the FDPA thereby authorizes the judge to sentence the defendant to some other sentence in accordance with federal sentencing guidelines. [FN314]

***1079** The FDPA empowers the jury with more sentencing power than is available to a jury under the Drug Kingpin Act. [FN315] The Drug Kingpin Act merely authorizes the jury to vote for or against a sentence of death. [FN316] In contrast, the FDPA allows the jury, by unanimous vote, to vote for a sentence of death, life imprisonment without parole, or some other lesser sentence. [FN317] Like the FDPA, however, the Drug Kingpin Act also requires the jury to be unanimous in a decision of death, and it mandates that the district court impose a sentence of death upon such a vote. [FN318]

The Drug Kingpin Act seems to automatically authorize the district court judge to impose some other sentence if the jury could not reach a unanimous decision on death. [FN319] In contrast, if a jury cannot reach a unanimous decision on death, the FDPA allows the jury to reach a unanimous decision for either life imprisonment without parole or some other lesser sentence. [FN320] According to the language of the FDPA, it still seems that a district

court judge may impose a lesser sentence if the jury cannot reach a unanimous decision. [FN321]

Up to this point, the jury has heard the evidence at the sentencing hearing, weighed the aggravating and mitigating factors, and rendered a verdict. [FN322] If the jury recommended death, then the judge was bound to impose a sentence of death. [FN323] At this point, the defendant begins a battle for his life.

F. Review of a Sentence of Death

If the jury recommends a sentence of death, the defendant is entitled to review of the sentence in accordance with the provisions of section 3595 of the FDPA. [FN324] The FDPA provides for review upon appeal by the defendant. [FN325] *1080 While the FDPA does not provide an automatic appeal like the Georgia death penalty scheme in Gregg, the Supreme Court has never required an automatic appeal; rather, the Supreme Court only requires "meaningful appellate review." [FN326] To this end, the FDPA requires the appellate court to look at the entire record upon review [FN327] and to address "all substantive and procedural issues raised on the appeal." [FN328]

The appellate court may reverse and remand the sentence of death for reconsideration by another jury, or the court could reverse and render for a sentence other than death. [FN329] The appellate court may reverse a death sentence upon a finding that the "sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." [FN330] An appellate court may also reverse upon a finding that the "admissible evidence and information adduced does not support the special finding of the existence of the required aggravating factor," [FN331] or upon a finding that the "proceedings involved any other legal error requiring reversal of the sentence that was properly preserved for appeal under the rules of criminal procedure." [FN332]

While the FDPA mandates that the appellate court reverse the sentence of death when one of the above factors is present, the FDPA does not allow relief if the error can be considered harmless beyond a reasonable doubt. [FN333] In addition, the FDPA does not provide for proportionality review like the Georgia death penalty statute at issue in Gregg. [FN334] The lack of proportionality review is especially troubling when considering the fact that the jury has the ultimate discretion to impose the death penalty. [FN335] Although it is theoretically possible under the FDPA for the district court to act in the role of decision-maker at the sentencing hearing, the court is usually bound by the jury's *1081 determination of death. [FN336] The complete vesting of authority in the jury may, in turn, require a form of proportionality review in order to minimize the arbitrary imposition of the death penalty. [FN337] However, the FDPA embodies no commitment to proportionality review. [FN338]

G. Appeals Under the FDPA

There are currently thirteen prisoners on federal death row, five pursuant to the Drug Kingpin Act and eight pursuant to the FDPA. [FN339] Many of the cases under the FDPA are currently on appeal, most notably, the case of United States v. McVeigh in the Fourth Circuit. [FN340] Because of overwhelming public interest in the McVeigh case, the district court for Colorado, under the direction of Judge Matsch, has given careful, considered review to all issues raised in pre-trial motions and to the decisions rendered during the trial and sentencing hearing. [FN341] Due to the unusual publicity of this case, the Fourth Circuit will probably also closely scrutinize the McVeigh appeal. In fact, many commentators have already proclaimed that McVeigh will be the benchmark for the federal death penalty. [FN342] Until that point, however, federal death penalty jurisprudence has United States v. Jones. [FN343]

*1082 IV. United States v. Jones

On February 18, 1995, Louis Jones, Jr. forcibly abducted Private Tracie Joy McBride at gunpoint from a laundry room at Goodfellow Air Force Base in San Angelo, Texas, injuring Private Michael Alan Peacock in the process. [FN344] According to the defendant, "On that day, the demons he had suppressed throughout his life overwhelmed [him], leading to tragic consequences." [FN345] Jones sexually assaulted and killed McBride,

depositing her body under a bridge located twenty minutes outside of San Angelo. [FN346]

On March 1, 1995, Louis Jones's ex-wife Sandra Lane informed Air Force investigators she had been attacked by Jones only two days before McBride's abduction. [FN347] The investigators convinced Sandra to file a complaint, and the San Angelo Police took a sworn statement. [FN348] An arrest warrant was issued for Jones, and Jones was arrested. [FN349] While in custody for the assault and abduction of Sandy, Jones was questioned regarding McBride's abduction. [FN350] In response to questioning by Air Force investigators, Jones gave a written statement admitting to the abduction and murder. [FN351] Jones subsequently led the authorities to McBride's body. [FN352]

On March 7, 1995, Jones was indicted on the following two counts: "1) kidnapping within the special maritime and territorial jurisdiction of the United States, resulting in the death of Tracie Joy McBride, in violation of [18 U.S.C. § 1201(a)(2) (1994)], and 2) assault of Michael Alan Peacock within the maritime and territorial jurisdiction of the United States, resulting in serious bodily injury, in violation of [18 U.S.C § 113(f) (1994)]." [FN353] In the fall of 1995, the defendant was tried and convicted of capital murder before the Honorable Sam R. Cummings in a federal district court in Lubbock, Texas. [FN354]

*1083 At the sentencing hearing, the jury quickly passed the threshold test of intent by finding two of the four statutory aggravating factors in section 3591(a). [FN355] The government then submitted the seven aggravating factors that it had included in its notice of intent to seek the death penalty. [FN356] Of the seven factors, the government submitted four statutory aggravating factors from the list in section 3592(c), and the jury found two of these factors unanimously and beyond a reasonable doubt. [FN357] The government also submitted three non-statutory aggravating factors, and the jury found two of those factors by unanimous vote and beyond a reasonable doubt. [FN358] In addition, eleven mitigating factors were found by at least one of the jurors. [FN359] On November 3, 1995, after weighing the four aggravating factors against the eleven mitigating factors, the jury returned a unanimous verdict recommending death, and the district court entered judgment accordingly. [FN360] The United States Court of Appeals for the Fifth Circuit, after considering the defendant's challenges raised on appeal, affirmed both the defendant's conviction and his death sentence. [FN361]

*1084 United States v. Jones, the first case challenging the FDPA to reach a federal appeals court, dramatically impacts federal death penalty law. [FN362] The case represents a revealing window into the FDPA and provides an excellent litmus test for federal death penalty jurisprudence. [FN363] Nearly all of the defendant's challenges in Jones contained the base allegation that something-the basis of the challenge-resulted in an "arbitrary and capricious" imposition of the death penalty in violation of the "cruel and unusual punishment clause" of the Eighth Amendment as applied in Furman. [FN364] However, Jones is best analyzed by dividing those challenges into the following two arenas: (1) Constitutional Challenges-challenges alleging that certain procedures of the FDPA result in an arbitrary and capricious imposition of the death penalty, and (2) Error Challenges-challenges alleging that district court errors and abuse of discretion led to an arbitrary and capricious imposition of the death penalty.

A. Constitutional Challenges

As with most death penalty appeals involving a statute, the Fifth Circuit's opinion in United States v. Jones began with facial challenges to the constitutional validity of the FDPA. [FN365] These constitutional challenges included a challenge to the broad use of prosecutorial discretion in creating non-statutory aggravating factors, the lack of proportionality review, and the relaxed evidentiary standard in the presentation of evidence at the sentencing hearing. [FN366] These challenges are some of the most pervasive constitutional challenges to both the Drug Kingpin Act and the FDPA; however, the challenges have been uniformly struck down. [FN367]

1. Prosecutor's Discretion

In a de novo review of the statute, the Fifth Circuit held that the *1085 prosecutor's creation of non-statutory aggravating factors was not an unconstitutional delegation of legislative power. [FN368] The Fifth Circuit initially investigated the origins and principles of the non-delegation doctrine. [FN369] The court explained that

the doctrine prohibits Congress from delegating its legislative power to another branch of government unless Congress formulates an "intelligible principle" to guide the delegatee's use of the legislative power. [FN370] The Fifth Circuit found that the FDPA contained sufficient "intelligible principles." [FN371] To begin, the court noted that the prosecutor has historically been allowed broad discretion to decide which crimes to prosecute, and the FDPA simply continued the tradition of investing such discretion with the prosecutor. [FN372]

Next, the Fifth Circuit highlighted four limitations on the prosecutor's discretion which served to guide the prosecutor's power. [FN373] First, the FDPA requires the prosecutor to give notice prior to trial. [FN374] Second, the prosecutor is guided by death penalty jurisprudence of the Supreme Court. [FN375] Third, the district court limits the prosecutor's discretion by limiting the admission of irrelevant and prejudicial evidence. [FN376] Fourth, the prosecutor's discretion is further limited by the need for the jury to find at least one statutory aggravating factor before even considering the non- statutory aggravating factors. [FN377]

Consequently, the Fifth Circuit joined the ranks of other federal courts who have held that a prosecutor's discretion to create nonstatutory aggravating factors under the FDPA does not violate the nondelegation doctrine. [FN378] Although the Supreme Court has not directly ruled on this issue with respect to the FDPA, the Supreme Court has upheld non-statutory aggravating factors in state schemes. [FN379] The defendant also challenged the *1086 FDPA's lack of proportionality review and relaxed evidentiary standard at the sentencing hearing. [FN380]

2. Lack of Proportionality Review

Holding that the Supreme Court has never mandated proportionality review, the Fifth Circuit focused on the FDPA's numerous other procedures which complied with the Supreme Court mandate against arbitrariness. [FN381] Although some commentators have argued that Gregg embodies a commitment to proportionality review, [FN382] the Fifth Circuit relied on more recent Supreme Court precedent to conclude that proportionality review is not mandatory. [FN383] The Fifth Circuit held that the FDPA's other procedures adequately guarded against the arbitrary imposition of the death penalty. [FN384] Despite the additional safeguards against arbitrary imposition, commentators have argued that different juries will make vastly different decisions; therefore, some form of proportionality review is still necessary in order to comply with the requirements of Furman. [FN385] Nonetheless, according to the Fifth Circuit, the FDPA's lack of proportionality review does not render the statute unconstitutional. [FN386]

3. Relaxed Evidentiary Standard at Sentencing Hearing

In turn, the Fifth Circuit rejected the defendant's challenge to the FDPA's relaxed evidentiary standard. [FN387] The defendant argued that the evidentiary standard was prejudicial. [FN388] However, the Fifth Circuit found that the relaxed evidentiary standard did not prejudice the defendant, but actually "help[ed] to accomplish the individualized sentencing required by the constitution." [FN389] By allowing the jury to have as much information as possible, the FDPA focuses the jury's attention on the individual defendant's character and criminal record. [FN390] Although most relevant information will be heard by the jury, the judge can still exclude prejudicial information at the sentencing hearing. [FN391] Therefore, the Fifth Circuit held that the relaxed *1087 evidentiary standard at the sentencing hearing does not violate the Constitution. [FN392]

B. Error Challenges

The error challenges raised by the defendant in Jones include challenges to the aggravating factors and challenges alleging confusion of the jury. [FN393]

1. Aggravating Factors

The defendant challenged the statutory aggravating factors for failing to narrow the discretion of the jury and for improper vagueness. [FN394] In turn, the defendant challenged the non-statutory aggravating factors for improper

vagueness, over breadth, and duplication. [FN395]

a. Statutory Aggravating Factors

The defendant challenged the use of two statutory aggravating factors found by the jury. [FN396] The challenged factors provided: (1) "The defendant Louis Jones caused the death of Tracie Joy McBride, or injury resulting in the death of Tracie Joy McBride, which occurred during the commission of the offense of Kidnapping," [FN397] and (2) "The defendant Louis Jones committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse to Tracie Joy McBride." [FN398] The Fifth Circuit found no reversible as to either factor. [FN399]

At the outset, the Fifth Circuit conceded that death penalty jurisprudence requires a capital punishment scheme to provide a mechanism for narrowing the class of defendants eligible for death [FN400] because the jury must be allowed to consider the circumstances of the crime before imposing the death penalty. [FN401] The court pointed out that death penalty schemes can either narrow *1088 the class of defendants at the trial stage or at the penalty stage, [FN402] and the FDPA's form of narrowing followed the latter approach by using aggravating factors at the sentencing hearing. [FN403]

The defendant alleged that the first factor failed to narrow the jury's discretion because it merely repeated the elements of the crime which had already served to narrow the jury's discretion. [FN404] The court relied on Supreme Court jurisprudence for the proposition that aggravating factors, even aggravating factors that simply repeat the elements of the crime, adequately meet the narrowing requirement as long as the aggravating factors actually serve to narrow the jury's discretion. [FN405]

Scrutinizing the aggravating factor, the Fifth Circuit found that despite the statutory aggravating factor's repetition of the substantive crime of kidnapping, the aggravating factor's "causal" requirement did in fact serve to additionally narrow the jury's discretion. [FN406] The court emphasized that a jury could find a defendant guilty of the crime of kidnapping with death resulting under section 1201 and still not find that the defendant "caused" the death. [FN407] Because the federal crime of kidnapping with death resulting under section 1201 [FN408] did not require that the defendant intend to kill the victim, the Fifth Circuit concluded that the first statutory aggravating factor's requirement of intention went beyond the mere elements of the crime. [FN409] Therefore, the court concluded that the statutory aggravating factor performed a narrowing function independent of a guilty verdict for the crime of kidnapping under the Federal Kidnapping Act. [FN410]

Continuing his challenges, the defendant alleged that the second aggravating factor found by the jury was unconstitutionally vague. [FN411] The defendant challenged the vagueness of the aggravating factor as failing to adequately inform the jury and leaving the decision to the arbitrary discretion of the jurors in violation of the requirements of Furman and the Eighth Amendment. [FN412] Relying on Fifth Circuit precedent, the court initially noted *1089 that challenges as to vagueness are reviewed with great deference for the statute in question. [FN413]

Employing a deferential review, the Fifth Circuit found that the second aggravating factor was not unconstitutionally vague. [FN414] First, the court noted that although the "heinous, cruel, and depraved" language alone would have been unconstitutionally vague, the statute adequately remedied the vagueness by requiring the offense to involve torture or physical abuse. [FN415] Second, the district court had defined each term with great detail. [FN416] Third, and most important to the Fifth Circuit, the aggravating factor had a "common-sense core meaning" that the jury was capable of understanding. [FN417] After rejecting both of the defendant's challenges to the statutory aggravating factors, the Fifth Circuit turned its focus to the defendant's more meritorious challenges to the non-statutory aggravating factors.

b. Non-Statutory Aggravating Factors

The defendant in Jones challenged the two non-statutory aggravating factors as being unconstitutionally vague, overbroad, and duplicative. [FN418] The two non-statutory aggravating factors found to be established beyond a reasonable doubt by a unanimous jury were: (1) "Tracie Joy McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas,"and (2) "Tracie Joy McBride's personal characteristics and the effect of the instant offense on Tracie Joy McBride's family." [FN419] The Fifth Circuit viewed "personal characteristics" as overlapping "young age, slight stature, background, and unfamiliarity." [FN420] Consequently, the Fifth Circuit found that the district court erred by submitting the duplicative aggravating factors to the jury. [FN421]

i. Finding Error

In finding error in the duplicative factors, the Fifth Circuit cited to McCullah for the proposition that "[s]uch double counting of aggravating *1090 factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally." [FN422] The Fifth Circuit recognized that Stringer prohibited the court from assuming that it would not have made a difference if the "thumb had been removed from death's side of the scale," especially in a weighing scheme, where aggravating factors lie at the heart of the jury's final decision regarding the imposition of death. [FN423] As a result, the district court's submission of duplicative aggravating factors was deemed to be error. [FN424]

The Fifth Circuit also concluded that the factors were invalid on the basis of the vagueness challenge. [FN425] Relying on the Supreme Court's standard for evaluation of vagueness challenges to aggravating circumstances in death penalty statutes, [FN426] the Fifth Circuit found that the two non-statutory aggravating factors failed to guide the jury's discretion or narrow the class of death eligible defendants. [FN427] The Fifth Circuit emphasized the lack of clarification by the district court's instructions with respect to "background," "personal characteristics," or "unfamiliarity with San Angelo." [FN428] In complete contrast to the district court's methodical clarification of the definitions of certain terms in the statutory aggravating factors, [FN429] the district court completely failed to clarify, define, or explain the non-statutory aggravating factors. [FN430] Because of the vagueness of the non- statutory aggravating factors, the Fifth Circuit concluded that the jury was allowed open-ended discretion in violation of the requirements of Furman. [FN431]

ii. Choosing a Standard of Review

After finding that the non-statutory aggravating factors were invalid because of both duplication and vagueness, the Fifth Circuit looked to precedent for guidance as to whether to reverse and remand or allow the death *1091 sentence to stand. [FN432] Like the Tenth Circuit in McCullah, [FN433] the Fifth Circuit relied on Stringer [FN434] in concluding that an appellate court must closely scrutinize the role of any invalid aggravating factor in the jury's decision to impose death. [FN435] However, unlike the Tenth Circuit, the Fifth Circuit only perceived two available options for reviewing the validity of the death sentence under the invalid aggravating factors. [FN436] The court relied on the Supreme Court's 1990 holding in Clemons v. Mississippi as authority to either reweigh the aggravating factors against the mitigating factors or to apply harmless error review. [FN437]

By relying solely on Clemons, the Fifth Circuit ignored the third option available to an appellate court according to the Supreme Court's 1992 holding in Stringer. [FN438] According to Stringer, "[w]hen the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence." [FN439] Therein, the Supreme Court authorized three options: (1) harmless error analysis, (2) re-weighing at the appellate level, or (3) re-weighing at the trial level. [FN440] The third option allows appellate courts faced with invalid aggravating factors to simply reverse and remand the case for re-weighing by a new jury at the trial level. [FN441] The Supreme Court also emphasized the possibility of a requirement "that when the weighing process has been infected with a vague factor[,] the death sentence must be invalidated." [FN442] The Tenth Circuit followed this third approach in McCullah and reversed and remanded for a reweighing at the trial court level. [FN443] The Tenth Circuit

arguably followed the best option because it refrained from super-imposing its own decision for the jury's decision on the basis of mere speculation as to how the jury would have decided the case under the new circumstances. [FN444]

*1092 iii. Review Under Harmless Error Analysis]cm

Upon consideration of its options, the Fifth Circuit, like the Fourth Circuit in Tipton, [FN445] chose to employ a form of harmless error review. [FN446] The Fifth Circuit first noted the varied options available to an appellate court when choosing which form of review to employ. [FN447] The court acknowledged that it could reweigh the factors itself by determining what the jury would have decided in the absence of any invalid aggravating factors. [FN448] Alternatively, the court noted that both Stringer and Clemons authorized it to use a form of harmless error review. [FN449] According to Clemons, two forms of harmless error review were available to the Fifth Circuit. [FN450] Under the first option, the Fifth Circuit could have "inquire[d] into whether, beyond a reasonable doubt, the death sentence would have been imposed had the invalid aggravating factor[s] been properly defined in the jury instructions." [FN451] Under the second option, the Fifth Circuit could "inquire into whether, beyond a reasonable doubt, the death sentence would have been imposed absent the invalid aggravating factor[s]." [FN452]

Employing the second authorized form of harmless error review, the Fifth Circuit concluded that the jury would have imposed the death sentence even without the two invalid non-statutory aggravating factors; thereby, the Fifth Circuit found the error harmless. [FN453] By first removing the two non- statutory aggravating factors from the mix, the Fifth Circuit was left with only two statutory aggravating factors to weigh against the eleven mitigating factors. [FN454] In an effort to disclaim any jury reliance on the two non- statutory factors, the Fifth Circuit pointed to the government's great emphasis on the two statutory aggravating factors and the requirement that the jury must find at least one of the statutory aggravating factors before imposing *1093 sentence of death. [FN455] By way of contrast, the Fifth Circuit asserted that the jury was not required to find any non-statutory aggravating factors before imposing a sentence of death. [FN456] Finally, the Fifth Circuit concluded its review abruptly by stating only that "the death sentence would have been imposed beyond a reasonable doubt had the invalid aggravating factors never been submitted to the jury." [FN457] This cursory analysis presumably satisfied the Fifth Circuit's harmless error review. [FN458]

iv. Lack of "Scrutiny" and "Thorough Analysis"

While Clemons and Stringer authorized the Fifth Circuit to employ a form of harmless error review, Stringer required the Fifth Circuit to scrutinize the effect of the invalid aggravating factor(s) on the jury's decision. [FN459] Specifically, the Court in Stringer required appellate courts to perform a "thorough analysis of the role an invalid aggravating factor played in the sentencing process" before affirming a death sentence. [FN460] The Fourth Circuit employed the same form of harmless error review in United States v. Tipton. [FN461] The Fourth Circuit's opinion indicates a thorough analysis of the role of the invalid aggravating factors and a high degree of scrutiny over the effect of the invalid aggravating factors. [FN462] Although the Fourth Circuit's opinion can be criticized for merely second-guessing what the jury would have done under the new circumstances, [FN463] the Fourth Circuit's opinion at least gave a detailed explanation of its analysis and conclusion. [FN464] Here, the Fifth Circuit applied a very loose interpretation to the Supreme Court's requirements of "scrutiny" and "thorough analysis."

The Fifth Circuit's analysis and "scrutiny" were sparse and hardly related to an examination of the role of the invalid non-statutory aggravating factors. In making its decision, the Fifth Circuit mainly relied on the FDPA's requirement that the jury must find a statutory aggravating factor, coupled with the fact that the jury was not required to find non-statutory aggravating factor(s) in order to impose a sentence of death. [FN465] Thereby, the Fifth Circuit relied only on the statutory structure of the FDPA. If the Fifth Circuit's reliance on the structure of the FDPA satisfies the requirement of "thorough analysis of the role an invalid aggravating factor played in the sentencing process," [FN466] then the Supreme Court's "scrutiny" and "thorough analysis *1094 requirements

have been effectively emasculated. Under such an analysis, any invalid non-statutory aggravating factor could be discounted by simply referencing the FDPA's emphasis on statutory aggravating factors as opposed to non-statutory aggravating factors. The Supreme Court must have envisioned greater scrutiny and analysis of the invalid non-statutory aggravating factor's role than merely referencing the statutory death penalty scheme. [FN467]

To bolster its decision, the Fifth Circuit also relied on the government's strong emphasis on the statutory aggravating factors. [FN468] By pointing to the government's great emphasis on the statutory aggravating factors, the Fifth Circuit implied that the government placed very little emphasis on the non-statutory aggravating factors. [FN469] However, the Fifth Circuit failed to adequately link the government's lack of emphasis on the non-statutory aggravating factors to the jury's lack of emphasis on the non- statutory aggravating factors. Moreover, the Fifth Circuit failed to explain why the government would introduce non-statutory aggravating factors if the factors would not be emphasized. Arguably, the government wanted to increase the quantity of aggravating factors, knowing that the "mere finding of an aggravating factor [would] imply a qualitative value to that factor." [FN470] Further, the Fifth Circuit never addressed the possibility that the two invalid non-statutory aggravating factors were given an implicit quantitative value by the jury. [FN471] Consequently, the Fifth Circuit's naked reliance on the structure of the FDPA and the small emphasis placed on the non-statutory aggravating factors arguably violates Supreme Court precedent by "assum[ing] it would have made no difference if the thumb had been removed from death's side of the scale." [FN472]

*1095 2. Jury Instructions

In Jones, the defendant challenged the jury instructions on two main grounds: (1) the failure to include the defendant's requested jury instructions, and (2) confusion resulting from the jury instructions which were actually given. [FN473]

Before addressing the defendant's complaints of error, the Fifth Circuit established the standards to be used in reviewing each challenge. [FN474] The court determined that the challenge to the district court's refusal to include the defendant's requested jury instructions would be reviewed underan abuse of discretion standard. [FN475] The Fifth Circuit next determined that the challenges to the district court's use of jury instructions resulting in jury confusion would be reviewed under either abuse of discretion or plain error, depending on whether the defendant objected below. [FN476] If the defendant objected below and thereby preserved the error, the Fifth Circuit would review under an abuse of discretion standard. [FN477] However, if the defendant failed to object below, the Fifth Circuit would review only under a plain error standard. [FN478]

Therefore, the failure of defendant's counsel to properly preserve error dramatically altered the review employed by the Fifth Circuit and potentially prejudiced the defendant's ultimate liberty-life. The Fifth Circuit found no reversible error in any of the challenges to the jury instructions, [FN479] but the standard of review employed by the court influenced the outcome as to at least one challenge to the jury instructions. [FN480] The Fifth Circuit reviewed the challenges systematically, beginning with the defendant's challenge to the district court's failure to grant the requested jury instructions. [FN481]

a. Failure to Give Requested Jury Instructions

The Fifth Circuit held that the district court did not abuse its discretion by refusing to give the defendant's requested jury instruction. [FN482] The defendant requested the district court to instruct the jury that a failure to find unanimously for death or life imprisonment without the possibility of release would automatically result in the judge imposing a sentence of life *1096 imprisonment without parole. [FN483] In order to decide if the district court had abused its discretion in refusing to give the defendant's requested jury instruction, the Fifth Circuit tested the requested instruction using a three-prong test: (1) was the requested instruction substantively correct, (2) did the actual jury instructions fail to substantively cover the requested instructions, and (3) did the failure to give the requested instruction greatly prejudice the defendant's case? [FN484] As the prongs of this test were viewed in conjunction, the Fifth Circuit would not reverse unless all three questions were answered affirmatively. [FN485]

Because the Fifth Circuit found the requested jury instructions were not substantively correct-a negative answer to the first prong-the court never reached the other two prongs of the test. [FN486]

With a cursory analysis, the Fifth Circuit concluded that the defendant's requested jury instructions were not substantively correct. [FN487] The court held that the defendant's requested instructions were incorrect because they would have falsely informed the jury that in the case of a non-unanimous jury verdict, the judge would automatically impose a sentence of life without parole. [FN488] To support its conclusion, the Fifth Circuit relied only on the FDPA's requirement that a jury return a unanimous verdict. [FN489] After finding that the jury must give a unanimous vote, the court theorized that in the event of a non-unanimous jury, a second sentencing hearing would have to be held in front of a second jury impaneled for that purpose. [FN490] In support of this claim, the court included only a bare citation to section 3593(b)(2)(B) of the FDPA. [FN491] Section 3593(b)(2)(B) states that a sentencing hearing will be conducted "before a jury impaneled for the purpose of the hearing if- the defendant was convicted after a trial before the court sitting without a jury." [FN492]

The Fifth Circuit's failure to find reversible error is suspect. The Fifth Circuit made two crucial mistakes in its analysis. First, the court failed to analyze the relationship of section 3593(e) and section 3594 of the FDPA. Second, the court relied on section 3593(b)(2)(B) to support its analysis.

*1097 i. Relationship Between Sections 3593(e) and 3594

Because little congressional history exists on legislative intent in enacting the FDPA, [FN493] an analysis of the statute requires a close reading of all the sections. [FN494] Section 3593(e) plainly requires the jury to be unanimous in its recommendation of any sentence. [FN495] In addition, section 3593(e) specifically limits the jury to a sentence of death, life imprisonment without parole, or what amounts to allowing the judge to sentence the defendant. [FN496] This section is easily understood to mean that the jury has three options and must be unanimous in choosing any of those options. [FN497] However, section 3593(e) does not state that if the jury is not unanimous, a new jury is impaneled. [FN498]

While section 3593(e)'s meaning is plain, section 3594 must be closely examined to determine its proper import in deciding whether a non-unanimous jury, in fact, defers to the judge. [FN499] Section 3594 states, in its relevant portion: "Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law." [FN500]

While the Fifth Circuit correctly concluded that section 3593(e) of the FDPA requires the jury to be unanimous in any sentence imposed, [FN501] the court failed to even mention the import of section 3594.

The FDPA seems to imply a default to the judge when a jury is not unanimous. [FN502] Although section 3593(e) states, in no uncertain terms, that *1098 "the jury by unanimous vote" shall recommend death, life imprisonment without parole, or some lesser sentence, it fails to even address a situation where a jury cannot reach a unanimous verdict. [FN503] Section 3593(e) should be read together with section 3594 in order to understand the statutory scheme of the FDPA. [FN504]

When these sections are read together, it seems that a non-unanimous jury should give way to the judge's imposition of some sentence less than a death sentence. [FN505] While the court's imposition of death and life imprisonment without the possibility of release is prefaced upon the recommendation of the jury, the court's imposition of any lesser sentence authorized by law is not prefaced upon any such recommendation. [FN506] If the drafters of the statute had intended the judge's imposition of a lesser authorized sentence to be conditioned by a recommendation of the jury, they could have easily drafted that sentence of the statute to indicate their intention. [FN507] If Congress had included "Upon a recommendation under section 3593(e)" before the statute's authorization for the court to impose a lesser sentence, Congress would have clearly and unequivocally conveyed its intent to make a judge's imposition of a lesser sentence contingent only upon such a unanimous

recommendation by the jury. [FN508] However, Congress did not word section 3594 in such a way. [FN509]

Congress may have intended section 3594 to act as a default under all circumstances. [FN510] By preceding the court's authorization to impose a lesser sentence with "otherwise," Congress arguably meant to establish the court's imposition of a lesser authorized sentence as the default in all cases where a jury could not reach a unanimous decision. [FN511] This reading of section 3594 is bolstered by the FDPA itself. [FN512] In three separate instances throughout the *1095 FDPA, the jury can become "hung," in the sense that the jury cannot reach a unanimous decision. First, a hung jury may result from the FDPA's threshold requirement that the jury unanimously find beyond a reasonable doubt at least one factor from the list of four statutory aggravating factors relating to the intent of the defendant. [FN513] Second, a hung jury may result from the FDPA's secondary requirement that the jury unanimously find beyond a reasonable doubt at least one factor from a list of statutory aggravating factors relating to the defendant's particular crime. [FN514] Third, a hung jury may result from the FDPA's requirement that the jury unanimously find for death, life imprisonment without parole, or some other lesser sentence. [FN515]

Examining each of the three instances, it seems apparent that Congress intended section 3594's "otherwise" language to act as a default in all situations where the jury failed to reach a unanimous decision. At least one court has construed a hung jury with respect to the threshold question as requiring the judge to discharge the jury and impose some other sentence authorized by law. [FN516] In addition, the FDPA specifically addresses what happens when a jury cannot reach a unanimous decision as to at least one of the aggravating factors from the statutory list of aggravating factors related to the defendant's particular crime. [FN517] In that instance, the FDPA authorizes the judge to impose any other sentence authorized by law. [FN518] Although Congress specifically provided for the judge to impose a lesser sentence in that instance, the "otherwise" language of section 3594 could have been enough to authorize the judge to impose some other lesser sentence in any event. [FN519] Finally, the use of the "otherwise" language in the FDPA's predecessor statute, the Drug Kingpin Act, authorizes the district court judge to impose any sentence other than death if the jury cannot make a unanimous recommendation as to death. [FN520] The Drug Kingpin Act's "otherwise" languag* *1100 seemingly operated as a default under all circumstances. [FN521] Therefore, the FDPA's "otherwise" language should be construed as a default as well. [FN522]

ii. Section 3593(b)(2)(B)

The Fifth Circuit made its second mistake by relying on only section 3593(b)(2)(B) of the FDPA to bolster its conclusion that a non-unanimous jury would result in a second jury being impaneled to sentence the defendant. [FN523] The court's citation to section 3593(b)(2)(B) is either misplaced or entirely inaccurate. Section 3593(b)(2)(B) states only that a sentencing hearing will be held in front of a jury impaneled specifically for that purpose when "the defendant was convicted after a trial before the court sitting without a jury." [FN524] Alternatively, the court may have incorrectly cited to section 3593(b)(2)(B) when it meant to cite to section 3593(b)(2)(C) which states that a sentencing hearing will be held in front of a jury impaneled specifically for that purpose when "the jury that determined the defendant's guilt was discharged for good cause." [FN525] Even if the court really meant to cite to section 3593(b)(2)(C), the court failed to show that lack of a unanimous jury is "good cause" for dismissal of the jury. If this were truly the case, absurd results could abound, as juries could be repeatedly dismissed for lack of a unanimous decision. Under either circumstance, the court's bare citation to section 3593(b)(2)(B) is less than adequate to justify its conclusion that a new jury is impaneled when a jury is "hung."

iii. Continued Review

In light of the foregoing analysis, the defendant's requested jury instructions were arguably substantively correct. The defendant requested a jury instruction telling the jury that in the event they were not unanimous, the judge would automatically "impose a sentence of life *1101 imprisonment without possibility of release." [FN526] Because section 1201 of the Federal Kidnapping Act provides for only a sentence of death or life imprisonment

without parole, the district court judge in Jones was only authorized to impose a sentence of life imprisonment without parole. [FN527] Therefore, if the jury was not unanimous, the judge should have automatically imposed a sentence of life imprisonment without parole. [FN528] Consequently, the Fifth Circuit was in error by finding that the defendant's requested jury instructions were not substantively correct.

If the Fifth Circuit would have found the defendant's requested jury instructions substantively correct, the court would have continued with its "abuse of discretion" review. [FN529] Continuing this review is enlightening. As the three-prong test is conjunctive, all three prongs must be met before an appellate court can reverse. [FN530] The second prong of the test, requiring that a requested jury instruction not be substantially covered in the actual jury charge, is easily satisfied because the district court's actual jury instructions did not instruct the jury on what would happen if it failed to reach a unanimous decision. [FN531] Furthermore, the third prong, requiring that the refusal to give instructions adversely affect the defendant's case, is overwhelmingly satisfied on the facts of Jones. The requested jury instruction would arguably have allowed any one juror not favoring the death penalty to single-handedly hold the verdict hostage because any non-unanimous verdict (even 11 for death and 1 for life imprisonment) would result in the judge's automatic imposition of life imprisonment without the possibility of release.

By failing to inform the jury of this fact, the district court's failure to give the requested jury instructions seriously impaired the defendant's case. In fact, post-verdict affidavits of two jurors in the Jones case emphatically illustrate this conclusion. [FN532] While these affidavits cannot be viewed as evidence by an appellate court under Federal Rule of Evidence 606(b), they help illustrate the conclusion that the defendant's case was seriously impaired because a reasonable juror could have been confused by this issue-in fact, two reasonable jurors were actually confused. [FN533] In conclusion, the Fifth Circuit failed to properly support its theory and failed to properly explain section 3594's relationship to its theory. Based on the unambiguous language of section 3594, the Fifth Circuit arguably should have reversed and remanded *1102 this case for re-sentencing.

b. Actual Jury Instructions Causing Confusion of the Jury

Turning next to the actual jury instructions issued by the district court, the defendant in Jones raised two points of error concerning the instructions given to the jury. [FN534] First, the defendant alleged that the jury instructions "erroneously led the jury to believe that a 'lesser sentence' than life without the possibility of release or parole was possible." [FN535] Second, the defendant alleged that "the [jury] instructions erroneously told the jury that if they were not unanimous about death or life without release, it would default to the judge to impose 'some other sentence authorized by law'-ie., the 'lesser sentence' mentioned throughout the proceedings." [FN536]

The jury instructions mirrored the language of the FDPA, instructing the jury as to three available sentencing options-death, life imprisonment without release, and some other lesser sentence. [FN537]

i. Lesser Sentence than Life Imprisonment Without Release

The Fifth Circuit found no reversible error in the district court's jury instructions with regard to the repeated references to a 'lesser sentence.' [FN538] Initially, the court plainly recognized that due process required the jury to be informed of all sentencing options. [FN539] The court then established the standard of review as "plain error" because the defendant failed to object to the "lesser sentence" instructions at the district court level. [FN540] Under the plain error standard described in Rule 52(b) of the Federal Rules of Criminal Procedure, *1103 the court tests the error to see if it: (1) is plain, and (2) affected substantial rights. [FN541] Applicable case law has created a three prong test by expanding on the two tests of Rule 52(b) and incorporating a threshold test for error. [FN542] Consequently, the test the Fifth Circuit employed was as follows: "(1) there must be an error, which is defined as a deviation from a legal rule in the absence of a valid waiver; (2) the error must be clear or obvious error under current law; and (3) the error must have been prejudicial or affected the outcome of the district court proceedings." [FN543]

Employing this standard, the Fifth Circuit found that the district court did in fact commit error. [FN544] The court noted that the FDPA acts only as a sentence enhancement provision and cannot provide substantive law. [FN545] Noting that "the substantive criminal statute [took] precedence over the death penalty sentencing provisions," the court looked to the Federal Kidnapping Act, the substantive law under which Jones was convicted, to determine what possible sentences the jury could recommend. [FN546] Under the Federal Kidnapping Act, the defendant could only be sentenced to death or life imprisonment without parole. [FN547] As the district court mirrored the language of section 3593 of the FDPA in the jury instructions, and thereby instructed the jury as to three sentencing options, [FN548] the Fifth Circuit found that the district court committed error. [FN549]

The Fifth Circuit next held that the error was not 'plain.' [FN550] The second step of the plain error analysis asks whether the error was "clear or obvious error under current law." [FN551] Because Jones is the first case concerning the FDPA to reach a United States Court of Appeals, the Fifth Circuit recognized that no case law provided the district court precedential guidance as to which law should control when a substantive criminal statute and the FDPA are in conflict. [FN552] With no other analysis, the Fifth Circuit concluded that the "error was not so obvious, clear, readily apparent, or conspicuous that the judge was derelict by not recognizing the error." [FN553]

***1104** Because the Fifth Circuit failed to find plain error, the court never reached the third prong of the plain error test. Had it reached the third prong, the Fifth Circuit would have surely reversed. The third prong simply requires that the error prejudice the outcome of the sentencing. [FN554] Theoretically, the outcome could have been seriously prejudiced because the jury may have gravitated toward a unanimous verdict in order to avoid the possibility of a lesser sentence being imposed by the judge. [FN555] Although the inclusion of the "lesser sentence" option may not be enough by itself to prove prejudice resulted, it becomes seriously prejudicial when coupled with the defendant's second contention, that the jury was led to believe the judge could impose some lesser sentence if the jury were not unanimous.

ii. Judge's Imposition of a "Lesser Sentence" if Jury is not Unanimous

The defendant challenged the jury instructions by contending that a reasonable juror could have believed that some other sentence could possibly be imposed by the district court judge if the jury was not unanimous in its decision. [FN556] On the other hand, the Fifth Circuit asked whether a juror could believe that some lesser sentence would automatically result if the jury was not unanimous in its decisions. [FN557] Although the difference between the defendant's challenge and the Fifth Circuit's rephrasing is subtle, the Fifth Circuit's rephrasing effectively diminished the likelihood that any reasonable juror would fit the description.

If, on the other hand, the Fifth Circuit had framed the issue as the defendant had requested, the likelihood that a reasonable juror would fit the description would have greatly expanded. As an affirmative answer to either phrasing of the issue would prove that error occurred, the Fifth Circuit's rephrasing of the issue unnecessarily heightened the defendant's burden. The Fifth Circuit's alternative view of the issue seemed to help it conclude that the district court did not commit reversible error by confusing the jurors as to what would happen if the jury were not unanimous.

***1105** The relevant portion of the jury instructions states:

Based upon this consideration, you the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence. . . . If you recommend that some other lesser sentence be imposed, the court is required to impose a sentence that is authorized by the law. In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. That is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended. . . . In order to bring back a verdict recommending the punishment of death or life without

the possibility of release, all twelve of you must unanimously vote in favor of such specific penalty. [FN558]

The court did not find error in the district court's failure to repeat the unanimity requirement or failure to instruct the jury on the effect of a non- unanimous jury. [FN559] In so finding, the court claimed that it had to examine the jury instructions "in their entirety." [FN560] Additionally, the court emphatically stated that federal courts were not constitutionally required to give instructions as to what happens if the jury is not unanimous. [FN561] Further, the court noted that the federal scheme requires a unanimous vote by the jury or no verdict results; [FN562] therefore, the court was not bound by precedent from Louisiana, a state employing a death penalty scheme which expressly provides that life imprisonment results if a unanimous decision for death is not reached. [FN563]

***1106** The Fifth Circuit also failed to find error in the jury verdict forms. [FN564] The jury verdict form for the "lesser sentence" only required the signature of the foreperson whereas the jury forms for death and life imprisonment without parole required the signatures of all the jurors. [FN565] The court reviewed for plain error and found error, but the court did not reverse because it claimed that when the jury verdict forms were read "in light of the entire jury instructions," no jury confusion could possibly result. [FN566]

In considering the prejudicial effect that the district court's jury instructions and jury forms could have had on a reasonable juror, the court refused to look at two juror affidavits which arguably showed that two jurors were, in fact, confused about whether the judge could impose a lesser sentence if the jury was not unanimous. [FN567] The court properly deemed the affidavits inadmissible in accordance with Rule 606(b) of the Federal Rules of Evidence. [FN568] The court emphasized that it would not allow a jury to impeach its own verdict. [FN569] Overall, the Fifth Circuit found that any possible jury confusion did not rise to the level of reversible error. [FN570]

However, when viewed "in its entirety," the jury instructions arguably gave the impression that the judge could impose a lesser sentence if the jury was not unanimous. [FN571] The provision of the jury instructions telling the jury not to worry about what happens if the jury cannot reach a decision on death or life imprisonment without parole, stating that it was "a matter for the court to decide in the event [the jury] conclude[s] that a sentence of death or life without the possibility of release should not be recommended," [FN572] seems quite prejudicial. Arguably, the court implied that if the jury was not unanimous, the district judge could impose a lesser sentence. When the jury instructions and jury forms are "read in their entirety" whether or not coupled with the affidavits of two jurors stating that confusion did, in fact, lend itself to the unanimous sentence of death imposed in Jones, it is obvious that the district court committed prejudicial error in its instructions to the jury. [FN573]

***1107** V. Walking Away From Jones

The Fifth Circuit's opinion in United States v. Jones is significant for a number of reasons. Because no other federal appeals court has reviewed the provisions of the FDPA, Jones marks out a place in history as the first federal appellate court opinion construing the FDPA. In addition to its status, the Fifth Circuit's opinion in Jones represents a good window into the FDPA because of the broad array of challenges entertained by the court and the court's systematic, workmanlike approach to the FDPA. Walking away from Jones, we know that the FDPA is not per se unconstitutional. [FN574] We also know that the prosecutor's broad discretion to create non-statutory aggravating factors is not an improper delegation of legislative power by Congress. [FN575] As well, the relaxed evidentiary standard and lack of proportionality review do not jeopardize the constitutionality of the FDPA. [FN576] In fact, the relaxed evidentiary standard actually helps to ensure an individualized sentencing, and the Constitution only requires "meaningful review," not proportionality review. [FN577]

Aside from its general reiteration of death penalty jurisprudence, the Fifth Circuit broke new ground in Jones. Specifically, the Fifth Circuit defined the FDPA as merely procedural, not substantive. Because the FDPA is closely analogous to a sentence enhancement statute, the Fifth Circuit treated the FDPA as a procedural statute. Although a narrow view of the Fifth Circuit's holding implies only that the FDPA's sentencing options must give

way to the sentencing options provided in the substantive criminal statute, the Fifth Circuit's holding could be viewed more broadly. By stating that the "substantive criminal statute takes precedence over the death penalty sentencing provisions," [FN578] the Fifth Circuit implied that the substantive criminal statute at issue could trump the FDPA on any conflict over provisions, not just sentencing options. Consequently, after Jones, one might find that any conflict between the FDPA and a substantive criminal statute will result in favor of the substantive law.

The Fifth Circuit also held that a non-unanimous jury at the sentencing hearing results in discharge of that jury and impaneling of a new jury. [FN579] While the Fifth Circuit's holding definitively solves the dilemma over non- unanimous juries at the sentencing hearing, the Fifth Circuit's holding is suspect in many regards. The Fifth Circuit's opinion is unsupported by statutory analysis, and in fact, a detailed statutory analysis seems to rebut the *1108 Fifth Circuit's holding. Specifically, the Fifth Circuit failed to analyze the FDPA as a whole, construing the purpose of all statutory provisions-specifically overlooking section 3594's "otherwise" language which seemingly implies a default to the district court judge if the jury does not recommend death or life imprisonment without release. Notwithstanding the Fifth Circuit's failure to perform an adequate statutory analysis, impaneling a new jury in every "hung jury" situation could lead to absurd results by possibly subjecting defendants to a cycle of repeated sentencing hearings.

The Fifth Circuit also joined the ranks of federal appellate courts that have construed challenges to the duplicative nature of statutory and non-statutory aggravating factors. While the Fifth Circuit employed harmless error review in this context, the Fifth Circuit arguably failed to properly perform the harmless error review. The Supreme Court requires a harmless error review to scrutinize and thoroughly analyze the effect of the invalid aggravating factor(s). The Fifth Circuit's opinion makes only a bald assertion that the invalid aggravating factors did not affect the jury's decision. [FN580] Therefore, the Fifth Circuit's opinion unconstitutionally assumes that the invalid aggravating factors did not affect the jury's decision.

The FDPA is new and relatively untested. By adding Jones to the mix of district court cases interpreting the FDPA, federal death penalty jurisprudence is sharpened into focus. The FDPA passed the Fifth Circuit's test in Jones; however, the statute is still in "constitutional limbo." Until the Supreme Court hears a case under either the FDPA or the Drug Kingpin Act, federal death penalty law will remain uncertain.

While Jones has answered some questions about the FDPA, it seems to have raised even more questions about the statute and its penumbras. Specifically concerning the defendant, Louis Jones: can we really say that his sentence of death was administered without "arbitrariness" or "capricious- ness?" Was Louis Jones' sentence of death "wanton and freakish?" While the Fifth Circuit addressed each point of error systematically and found that the sentence was not "cruel and unusual," the court arguably overlooked the prejudice which grew and compounded with every error at the district court level. For now, however, the Fifth Circuit's opinion will occupy its honorary position as the premiere authority on the FDPA for the Fifth Circuit and all federal courts.

Louis Jones committed an atrocious murder and may truly deserve the death penalty for his crime; however, death penalty jurisprudence interpreting the Fifth and Eighth Amendments of the United States Constitution requires the procedures for imposition of a sentence of death to provide adequately for "due process" and to be free of any indication of an "arbitrary and capricious' *1109 imposition of a death sentence. [FN581] Because the district court committed several errors which arguably could have justified the court's reversal and remand, the Fifth Circuit should have reversed and remanded for re-sentencing by another jury. While reprehensible crimes deserve the death penalty, the imposition of the death sentence should not be at the expense of good federal death penalty jurisprudence anymore than it should be at the expense of the defendant's right to an individualized sentence. [FN582]

FN1. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (arguing that police wiretapping violated Olmstead's constitutional rights). The cited quotation, included in the concluding paragraph of Justice Brandeis' dissent, reads as follows:
Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to

observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means-to declare that the government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.
Id. (Brandeis, J., dissenting); see also Mapp v. Ohio, 367 U.S. 643, 659 (1961) (quoting Justice Brandeis' dissent in Olmstead for the proposition that the government and judiciary should not come into court with dirty hands, specifically referring to violations of the Fourth Amendment protection against search and seizure without a warrant).
Timothy McVeigh, the convicted Oklahoma City bomber, quoted Justice Brandeis' dissent in Olmstead at his sentencing hearing, saying: "If the Court please, I wish to use the words of Justice Brandeis dissenting in Olmstead to speak for me. He wrote, 'Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.' That's all I have." Transcript of Hearing Where McVeigh Was Formally Sentenced to Death, Associated Press, Aug. 14, 1997, available in 1997 WL 4879465; McVeigh Sentencing Transcript, Daily Oklahoman, Aug. 15, 1997, available in 1997 WL 1529509. McVeigh either indirectly admitted his guilt by criticizing the government as a lawbreaker, thereby attempting to justify his own actions, or he could have been criticizing the government's actions in his conviction and sentencing.

FN2. 132 F.3d 232, 237 (5th Cir. 1998); see Federal Death Penalty Act of 1994, Pub. L. No. 103-322, 108 Stat. 1959 (codified in main part at 18 U.S.C. §§ 3591-98 (1994), also codified in scattered sections of 18 U.S.C.).

FN3. Jones, 132 F.3d at 237; 18 U.S.C. § 1201.

FN4. See Jones, 132 F.3d at 237-53; see infra Part IV.

FN5. See infra Part IV.B.

FN6. See United States v. McVeigh, 958 F. Supp. 512, 514-15 (D. Colo. 1997) (holding that victims of the bombing were entitled to attend the trial and still give "impact" testimony); United States v. McVeigh, 944 F. Supp. 1478, 1483-91 (D. Colo. 1996) (entertaining challenges to the review provisions of the FDPA, the government's notice of intent to seek the death penalty, and the particular aggravating factors alleged by the government); United States v. Nguyen, 928 F. Supp. 1525, 1532-52 (D. Kan. 1996) (entertaining a comprehensive list of challenges to the FDPA and the particular aggravating factors alleged); United States v. Chanthadara, 928 F. Supp. 1055, 1057-59 (D. Kan. 1996) (entertaining challenges to the evidentiary standards of the sentencing hearing, procedure followed by government, categories of substantive offenses, and aggravating factors); United States v. Roman, 931 F. Supp. 960, 962-63 (D. R.I. 1996) (entertaining a motion to compel the government to reveal aggravating factors prior to the government's notice of intent to seek death penalty); Nichols v. Reno, 931 F. Supp. 748, 751-52 (D. Colo. 1996), aff'd, 124 F.3d 1376 (10th Cir. 1997) (entertaining a suit for a declaration that notice of intention to seek death penalty was invalid due to the Attorney General's violation of the United States Attorney's Manual); United States v. Davis, 912 F. Supp. 938, 941-50 (E.D. La. 1996) (determining the validity of various non-statutory aggravating factors); United States v. Davis, 904 F. Supp. 554, 557-63 (E.D. La. 1995) (entertaining various challenges to the federal statutory capital sentencing scheme). These cases represent the exclusive list of district court cases construing the FDPA only to the extent that non-published district court opinions, such as United States v. Jones at the district court level, are not considered. Although Nichols v. Reno has reached the appellate level, this case is technically not the first case to reach the appellate court level because it concerns itself only with a pre- trial motion, like all of the aforementioned district court cases. 124 F.3d 1376, 1378 (10th Cir. 1997). The Tenth Circuit in Nichols affirmed the district court's holding. See id. The court found that the Attorney General violated none of Nichols' rights under the Administrative Procedure Act or Due Process Clause of the United States Constitution by failing to comply with the procedure for notice of intent to seek the death penalty outlined in the United States Attorney's Manual. See id.

FN7. See infra notes 453-72, 487-92 and accompanying text.

FN8. See infra notes 487-525 and accompanying text.

FN9. See infra notes 523-25 and accompanying text.

FN10. See infra notes 453-72 and accompanying text.

FN11. Specifically, note the Fifth Circuit's review of whether the duplication and vagueness of the non-statutory aggravating factors warranted reversal and remand. See infra notes 453-72 and accompanying discussion.

FN12. See Jean-Pierre Goyer, Capital Punishment: New Material 1965-1972 34-35 (1972).

FN13. See id. at 35. Goyer shows the distribution per type of crime: "[M] urder (3,334 executions out of 3,859 or 86.4%), rape (455 executions or 11.8%), kidnapping (20 executions), armed robbery (25 executions), burglary (11 executions), aggravated assault (6 executions) and espionage or sabotage (8 executions). For other crimes, the death penalty has fallen into disuse." Id.; see also 134 Cong. Rec. E2815 (daily ed. Sep. 7, 1988) (extension of remarks by Rep. Clay) ("Between the years 1930 and 1982, 3,800 persons were officially executed in the United States.").

FN14. See Goyer, supra note 12, at 35 ("Between 1965 and 1971 only ten executions took place, seven in 1965, one in 1966 and two in 1967. There were none in 1968, 1969, 1970, or 1971, at least up to September of that year.").

FN15. See Nichols' Attorneys Argue Against Use of Death Penalty, Dallas Morning News, Nov. 21, 1995, at D16, available in 1995 WL 9073548; see also 140 Cong. Rec. S5340 (daily ed. May 6, 1994) (statement of Sen. Moseley-Brown) ("No Federal executions have been carried out since 1963 and, until very recently, prosecutions under federal death penalty law were rare.").

FN16. 408 U.S. 238 (1972) (per curiam).

FN17. The Senate in 1968, and the House of Representatives in 1972, held subcommittee hearings considering abolition of the federal death penalty. See Peggy M. Tobolowsky, Drugs and Death: Congress Authorizes the Death Penalty for Certain Drug-Related Murders, 18 J. Contemp. L. 47, 48 (1992).

FN18. See id. But cf. Carol S. Steiker & Jordan M. Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 Harv. L. Rev. 355, 410 (1995) ("The dearth of executions in the years preceding Furman was more likely a product of the NAACP Legal Defense Fund's 'moratorium' litigation strategy than it was an indication of popular attitudes about capital punishment.")

FN19. See infra notes 76-77 and accompanying discussion. In 1988, Congress enacted death penalty sentencing in the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4387-95 (codified as amended at 21 U.S.C. § 848 (1994)).

FN20. 408 U.S. 238 (1972) (per curiam).

FN21. See id. at 239.

FN22. Id. at 239-40 (emphasis added). Because the death penalty statutes in question were state enactments, the Eighth Amendment applied to the states only through the Fourteenth Amendment's Due Process Clause. See id. at 240-41 (Douglas, J., concurring).

FN23. See id. For a narrow view of the holding in Furman, see Paul D. Kamenar, Death Penalty Legislation for Espionage and Other Federal Crimes is Unnecessary: It Just Needs a Little Re-enforcement, 24 Wake Forest L. Rev. 881, 892 (1989) (arguing that because the per curiam opinion only reversed the cases before the Court, and the nine concurring opinions attached to the per curiam opinion were only persuasive authority, the Court's holding did nothing more than reverse the cases before the Court and invalidate the procedures of Georgia and Texas).

FN24. See Kamenar, supra note 23, at 892.

FN25. See Furman, 408 U.S. at 240. For a good analysis of the holdings of each justice and the possibility of a different outcome based upon a change in the Court's composition, see Kamenar, supra note 23, at 892-95.

FN26. See Furman, 408 U.S. at 240-470.

FN27. Id. at 309 (Stewart, J., concurring).

FN28. Id. (Stewart, J., concurring).

FN29. Id. at 310 (Stewart, J., concurring). The statutes in question were found to be unconstitutional through a violation of the Eighth Amendment's prohibition against "cruel and unusual punishment," made applicable to the states by way of the Fourteenth Amendment's due process protection. See id. at 239-40.

FN30. See id. at 310 (Stewart, J., concurring).

FN31. Randall Coyne & Lyn Entzeroth, Capital Punishment and the Judicial Process 150 (1996-97 Supplement); see also Tobolowsky, supra note 17, at 47-48 (purporting that Furman invalidated every death penalty statute in the country); Julian S. Nicholls, Comment, Too Young to Die: International Law and the Imposition of the Juvenile Death Penalty in the United States, 5 Emory Int'l L. Rev. 617, 623 (1991) (purporting that Furman effectively eliminated all state death penalty legislation). Indeed, the idea that Furman invalidated every death penalty statute became the "popular belief." See Kamenar, supra note 23, at 881. For a contrary view with respect to the federal death penalty statutes, see id. at 884-85, 891-92, 894-95 (explaining that all federal death penalty statutes left on the books after Furman were still constitutional, without further legislative changes, because the federal sentencing scheme already possessed the twin procedural features that were lacking in the Georgia and Texas schemes struck down by the Court in 1976; also arguing that because of changes in the personnel of the Court, the Court would not find these statutes unconstitutional; and concluding that the current federal death penalty statutes just need a little reinforcing).

FN32. See Dana L. Bogie, Note, Life or Death? The Death Penalty in the United States and the New Republic of South Africa, 3 Tulsa J. Comp. & Int'l L. 229, 247 (1996); Gary Casimir, Comment, Payne v. Tennessee: Overlooking Capital Sentencing Jurisprudence and Stare Decisis, 19 New Eng. J. Crim. & Civ. Confinement 427, 441 (1993); Nicholls, supra note 31, at 623.

FN33. See Gregg v. Georgia, 428 U.S. 153, 179-80 (1976) ("The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person." (citations omitted)). Justice White's concurring opinion in Furman relied most heavily on the infrequent imposition of the death penalty. See Furman, 408 U.S. at 313 (White, J., concurring). However, "[i]t turned out, of course, that Justice White was way off the mark." Steiker & Steiker, supra note 18, at 410. Moreover, public opinion polls indicated majority support for the death penalty in 1972, and the post-Furman legislative reaction of 35 states and the federal government clearly demonstrated this support. See id.

FN34. See Antihijacking Act of 1974, Pub. L. No. 93-366, § 103(b), 88 Stat. 409, 410 (codified as amended at 49 U.S.C. § 1155(b) (1994)); see also Gregg, 428 U.S. at 179-80; Kamenar, supra note 23, at 881 n.2 (explaining that the Aircraft Piracy Statute (Federal Aviation Act of 1958) "was the only federal death penalty statute amended after Furman to provide additional procedural safeguards").

FN35. See Act for the Protection of Foreign Officials and Official Guests of the United States, Pub. L. No. 92-539, § 201, 86 Stat. 1072 (codified at 18 U.S.C. § 1201 (1994)); see also Kamenar, supra note 23, at 881 n.2. The Kidnapping Statute was amended in 1994 by the FDPA to once again provide for the imposition of a death sentence. See Pub. L. 103-322, Title VI, Sept. 13, 1994, 108 Stat. 1959 (codified in 18 U.S.C. § 1201 (1994)).

FN36. See Kamenar, supra note 23, at 881, n.2.

FN37. See Coyne & Entzeroth, supra note 31, at 148-49. Apparently, David Bruck of the Federal Death Penalty Resource Counsel assigned these statutes the nickname "zombie statutes" because they were neither amended nor deleted from the United States Code after Furman. See id. at 148 n.4. The list of 18 "zombie statutes" also included the two statutes that Congress attempted to bring in line with Furman: (1) Aircraft hijacking resulting in death (Aircraft Piracy Statute (Federal Aviation Act of 1958), 49 U.S.C. § 1155(b)), and (2) Kidnapping resulting in death (Kidnapping

Act, 18 U.S.C. § 1201). See id. at 148-49.

FN38. 428 U.S. 153 (1976).

FN39. See id. at 153.

FN40. Id.

FN41. See id. at 163.

FN42. See id. (defining the six crimes as "murder, kidnapping for ransom or where the victim is harmed, armed robbery, rape, treason, and aircraft hijacking").

FN43. See id. at 164-65.

FN44. See id. at 164. The statute failed to offer guidance as to the scope of the non-statutory mitigating and aggravating factors, except to say that the non-statutory aggravating factors were limited to those "authorized by law." See id.

FN45. See id. at 189 ("Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."). The plurality opinion of the Court in Gregg found that the new Georgia death penalty statute "focus[ed] the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant." Id. at 206. For a contrary view, see Justice Blackmun's dissent from the denial of certiorari in Callins v. Collins, 510 U.S. 1141, 1144 (1994), which implies that the two functions are contradictory. See also Callins, 510 U.S. at 1144 (Blackmun, J., dissenting from denial of certiorari) (abandoning the battle for developing "procedural and substantive rules" for imposition of the death penalty and conceding that "the death penalty experiment has failed"). Specifically, Justice Blackmun stated that "[t]he problems [which] were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, as virulent and pernicious as they were in their original form." Id. (Blackmun, J., dissenting from denial of certiorari). Justice Blackmun seemed to be implying that the two separate goals of consistency (lack of arbitrariness) and individualized sentencing could not be satisfied together. See id. (Blackmun, J., dissenting from denial of certiorari).

FN46. See Gregg, 428 U.S. at 166.

FN47. See id. at 166-67. The third requirement represents a form of comparative proportionality review in death penalty statutes. See David Baldus, When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences, 26 Seton Hall L. Rev. 1582, 1585 (1996) (arguing that Furman embodies a commitment to comparative proportionality). Twenty-one states require the highest court of the state to review all death penalty cases by comparing them with similar cases in order to ensure that the punishment of death is not excessive. See id. In making this determination, the court usually considers the dual requirements of Furman: (1) the character of the crime and (2) the record and character of the defendant. See id.; Gregg, 428 U.S. at 206.

FN48. See Gregg, 428 U.S. at 207.

FN49. See id. at 187.

FN50. See id. at 196-206.

FN51. See id. at 195.

FN52. See id.

FN53. See id. at 206.

FN54. The Court construed the holding in Furman to be that "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Id. at 189.

FN55. See id. at 206.

FN56. 428 U.S. 242 (1976).

FN57. 428 U.S. 262 (1976).

FN58. 428 U.S. 280 (1976).

FN59. 428 U.S. 325 (1976).

FN60. See Proffitt, 428 U.S. at 243; Jurek, 428 U.S. at 264; Woodson, 428 U.S. at 281-82 ; Roberts, 428 U.S. at 326.

FN61. See Proffitt, 428 U.S. at 248-49, 259-60.

FN62. See Jurek, 428 U.S. at 268-69.

FN63. See Woodson, 428 U.S. at 304 (noting that the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death"); Roberts, 428 U.S. at 333. The Louisiana statute attempted to narrow the class of convicted defendants eligible for the death penalty by creating a new crime called "first-degree murder," which was very similar in definition to the crime of "capital murder" created by Texas. See id. However, while the Court found Texas' statute constitutional in Jurek, the Court found that without any further possibility of putting on mitigating evidence in order to individualize the conviction, the statute violated the Constitution. See id. (citing Williams v. New York, 337 U.S. 241, 247 (1949)). The Court in Roberts emphasized that "[t]he futility of attempting to solve the problems of mandatory death penalty statutes by narrowing the scope of the capital offense stems from our society's rejection of the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.'" Id. (quoting Williams, 337 U.S. at 247).

FN64. See Gregg v. Georgia, 428 U.S. 153, 206-07 (1976); Proffitt, 428 U.S. at 248-49; Jurek, 428 U.S. at 269.

FN65. Woodson, 428 U.S. at 305.

FN66. See Woodson, 428 U.S. at 304-05; Roberts, 428 U.S. at 336; But cf. Kamenar, supra note 23, at 884-86 (hypothesizing that because the Court in Furman and Gregg established only a need for guiding and channeling of discretion in the imposition of the death penalty, a statute that imposes death automatically on a narrow class of criminals, such as assassins of the President or traitors, would probably be upheld). It should be noted, however, that the Kamenar position looks past the second requirement of the Court-that the jury consider the individual characteristics and record of the defendant. See Gregg, 428 U.S. at 206; Woodson, 428 U.S. at 304; Roberts, 428 U.S. at 333.

FN67. See Woodson, 428 U.S. at 305; Roberts, 428 U.S. at 333.

FN68. See Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

FN69. See Gregg, 428 U.S. at 190-92; Proffitt, 428 U.S. at 248-49, 259- 60.

FN70. See Gregg, 428 U.S. at 206; Woodson, 428 U.S. at 304; Roberts, 428 U.S. at 333-34.

FN71. See Gregg, 428 U.S. at 206; Woodson, 428 U.S. at 304; Roberts, 428 U.S. at 333-34.

FN72. See Gregg, 428 U.S. at 190-93.

FN73. See id. at 195. A bifurcated trial allows the jury to have the necessary information during the sentencing hearing without prejudicing the defendant during the trial. See id.

FN74. See Clemons v. Mississippi, 494 U.S. 738, 749 (1990); Pulley v. Harris, 465 U.S. 37, 45 (1984); Gregg, 428 U.S. at 195, 198, 204-06; Proffitt, 428 U.S. at 253. While the Supreme Court in Gregg noted that Georgia's automatic right to appeal provided a fundamental safeguard, the Court also noted that the procedures in Georgia's statute were not the only way to comply with the requirements of Furman. See Gregg, 428 U.S. at 195.

FN75. See Gregg, 428 U.S. at 195.

FN76. See id.

FN77. In fact, most of the statutes remained on the books exactly as they were before Furman, until the FDPA resurrected them. See Kamenar, supra note 23, at 881 n.2; see also Coyne & Entzeroth, supra note 31, at 148 (citing the unaffected "zombie statutes").

FN78. See Charles O. Jones, Separate but Equal Branches 42-45 (1995).

FN79. See Harry A. Chernoff, The Politics of Crime, 33 Harv. J. on Legis. 527, 534 (1996).

FN80. See id. at 533-38.

FN81. See id. at 527 (noting that the Violent Crime Control and Law Enforcement Act of 1994 was the "product of several political crosswinds"). Democratic Senator Joseph Biden and Representative Charles Schumer banned together to "implement a long-term political strategy to reposition their party." Id. at 538. As well, "[u]nder Biden and Schumer's leadership, Democratic crime proposals during this period regularly called for expansion of the death penalty to cover more than fifty new offenses." Id.

FN82. See id. at 533-35 (noting that Ronald Reagan made crime a priority, specifically focusing on capital punishment).

FN83. See Comprehensive Crime Control Act of 1984, ch. 2, Pub. L. No. 98-473, 98 Stat. 1987 (1984).

FN84. See Testimony of Kenneth R. Feinberg Before the House Subcommittee on Criminal Justice, 146 Prac. L. Inst. Crim. L. & Urban Probs. 841, 849-50 (1987). Mr. Feinberg recommended against delay in the enactment of the Sentencing Guidelines: [For fear of] mischievous amendments which could test the bipartisan spirit which gave rise to the comprehensive sentencing reforms. In particular, the death penalty looms large as a likely amendment to any legislative vehicle. The inability of the Commission itself to avoid the subject of the death penalty leads me to conclude that theory must give way to reality and that delay-however useful it might be-is not achievable without running unacceptable political risks that the guidelines would be held hostage to other law enforcement amendments designed to play to the constituents back home. . . . Experience tells us that carefully considered criminal justice legislation and national politics do not mix.
Id. (emphasis added).

FN85. See supra note 84.

FN86. See Drug Kingpin Act, Pub. L. No. 100-690, § 7001(a)(2), 102 Stat. 4181, 4387 (1988) (codified at 21 U.S.C. § 848 (1994)).

FN87. See 21 U.S.C. § 848(e)(1).

FN88. See Death Penalty for Drug Kingpins-A Constitutional Idea Whose Time Has Come, 135 Cong. Rec. S13,684-02, available in 1989 WL 186261 (daily ed. Oct. 18, 1989) (comments by Senator Alphonse D'Amato) (arguing for imposition of the death penalty for anyone found to be in the leadership of major drug organizations,

whether or not a death resulted, based on a finding that other crimes not involving death and narrowly drawn over a matter that caused enormous magnitude of public harm-such as treason, espionage, and airliner hijacking-have been deemed constitutional); see also 137 Cong. Rec. S8497 (daily ed. June 24, 1991) (statement by Sen. Biden). Senator Biden stated:
Mr. President, in 1986 this Senator and 96 others voted for a drug kingpin death penalty which is now the law. Last year and again this year, the administration returned to the Senate with a new drug kingpin death penalty. To any listener, including my colleagues, they are wondering what is all this drug kingpin death penalty stuff: You were just telling me, we have a death penalty for drug kingpins and now you are telling me there is a new amendment for drug kingpins. How is it different?
Id. In answer to the dilemma, Senator Biden explained that the 1988 "Drug Kingpin Death Penalty" can only be employed where death results, and anyone involved in a drug enterprise, not only drug kingpins, can be sentenced to death under the 1988 Act. See id. In contrast, Senator Biden explained that under the new proposal, the "Biden-Thurmond Substitute," the death penalty could be imposed (1) for a kingpin without death resulting, (2) for anyone in a drug ring who attempt murder, and (3) for a felony murder involving a drug deal. See id.

FN89. See 21 U.S.C. § 848(e).

FN90. See id. §§ 848(k), (n)(1). The FDPA's sentencing phase procedures were largely modeled after the Drug Kingpin Act. See 139 Cong. Rec. S459 (daily ed. Jan. 22, 1994) (statement of Sen. Thurmond). Senator Thurmond, in introducing the Federal Death Penalty Act of 1993, stated: "[T]his bill provides procedures similar to those put in place by the death penalty included in the drug bill." Id.

FN91. See Chernoff, supra note 79, at 535-39. Candidate George Bush argued that "the war on crime will not be won until liberals stop coddling criminals." Id.

FN92. See S. 21, 101st Cong., 1st Sess. (1989).

FN93. See S. 1225, Title II, 101st Cong., 1st Sess. (1989).

FN94. See Kamenar, supra note 23, at 882 n.6 ("Despite the public opinion polls showing that the overwhelming majority of the American people support the death penalty, passage of these bills by the Congress, especially by the House of Representatives, is not expected."); see also 138 Cong. Rec. S16,162 (daily ed. Oct. 1, 1992) (statement by Sen. Hatch) ("[The Federal Death Penalty Act of 1992] stands in contrast to the Democratic crime bill which emerged from the conference. That bill took the most liberal, procriminal, provisions on the death penalty, habeas corpus, and the exclusionary rule passed by either the Senate or the House of Representatives.").

FN95. See 135 Cong. Rec. S289-01, S299 (daily ed. Jan. 25, 1989); 136 Cong. Rec. S7306 (daily ed. June 5, 1990) (statement by Sen. Biden); 137 Cong. Rec. S579-01, S833 (Jan. 14, 1991); 139 Cong. Rec. S195-02, (Jan. 21, 1993).

FN96. While the bill passed the Senate and a similar bill passed the House in 1990, Congress failed to send the bill to the President.

FN97. See Chernoff, supra note 79, at 538 (quoting Senator Biden as jokingly saying, "Democratic proposals 'did everything but hang people for jaywalking' "). Democratic Senator Biden and Representative Schumer introduced a democratic version of President Bush's crime plan. See id. at 539.

FN98. See 137 Cong. Rec. S8488-03 (June 24, 1991). This bi-partisan proposal truly exemplified the compromising nature of politics, as both Republicans and Democrats made concessions to the other party. See id. at S8488-89.

FN99. See Chernoff, supra note 79, at 542-44 (noting that Clinton's victory over Bush was at least partially due to Clinton's "tough on crime" campaign). Electing a Democratic President to the White House shifted the balance of power on the crime issue: the Democratic Party took the bully pulpit. See id. at 542 (noting the comment of Senator Orrin Hatch (R-Utah) in 1991 that "'President [Bush] has a better pulpit [and that] [i]f Democrat's don't compromise, they're going to have a rough time in 1992'").

FN100. Id. at 547 (arguing that Clinton failed to push the crime issue after campaigning to put 100,000 more cops on the street because no one in the Cabinet or staff was a strong anti-crime proponent). Whatever the reasons for President Clinton's withdrawal from the crime issue, Congress inherited the task of passing crime legislation in 1992-94. See id. at 549-56. This task was led by Senator Joseph Biden and Representative Charles Schumer for the Democrats. See id. at 550. However, Senator Strom Thurmond and Senator Orin Hatch seemed to spearhead the Republican efforts. See 138 Cong. Rec. S16,143- 04, S16,161 (1992) (comments by Senator Orin Hatch, introducing the Crime Control Act of 1992); 139 Cong. Rec. S195-02, S459 (1993) (comments by Senator Strom Thurmond, introducing the Federal Death Penalty Act of 1993).

FN101. See Chernoff, supra note 79, at 566. Senator Majority Leader Bob Dole called the crime bill "too much pork and too little punch." See id. Senator Phil Gramm claimed that the bill "coddled criminals." See id. at 562. Senator Bob Walker criticized the bill as "welfare for criminals." See id. at 563.

FN102. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 U.S.C.). Although the two Acts passed in different years, that quirk seems attributable to the failure of Congress to rename the Crime Control Act to 1994.

FN103. See Chernoff, supra note 79, at 570-73.

FN104. See Charles K. Eldred, The New Federal Death Penalties, 22 Am. J. Crim. L. 293, 294-96 (1994).

FN105. See 139 Cong. Rec. S195-02, S459 (1993) (comments by Senator Thurmond) ("The bill I am offering today comports with the constitutional requirements outlined by the Supreme Court and establishes procedures for the imposition of the death penalty for the numerous Federal crimes that currently authorize a sentence of death.").

FN106. See **United States v. Jones, 132 F.3d 232, 247 (5th Cir. 1998)** ("The FDPA acts like a sentence enhancement provision in that it does not add to or otherwise affect the penalties available under the substantive criminal statutes."); see also 135 Cong. Rec. S289-01, S300 (1989) (comments by Senator Strom Thurmond) (noting that the Federal Death Penalty Act only "establishes the procedures for the imposition of the death penalty for the numerous Federal crimes that currently authorize a sentence of death").

FN107. See Dave Harmon, New Law for Death Penalty Faces Test in Bombing Trial, Denv. Post, May 28, 1995, at A2, available in 1995 WL 6574294; Dave Harmon, Federal Death Penalty Faces Tests, Ft. Worth Star-Telegram, May 2, 1995, at 1, available in 1995 WL 5651850; G. Robert Hillman, McVeigh Faces Expanded Death Penalty Law: 60 Types of Federal Crimes Now Qualify, Dallas Morn. News, June 4, 1997, at 22A, available in 1997 WL 2674514.

FN108. See 139 Cong. Rec. S195-02, S459 (1993) (comments of Senator Thurmond) ("This bill provides procedures similar to those put in place by the death penalty included in the drug bill.").

FN109. Compare 18 U.S.C. §§ 3591-98 (1994) with 21 U.S.C. § 848 (1994).

FN110. See Gregg v. Georgia, 428 U.S. 153, 195 (1976).

FN111. Compare 18 U.S.C. §§ 3591-98 (using aggravating and mitigating factors to guide the jury's discretion, and providing for appellate review) with Gregg, 428 U.S. at 195 (recommending the use of bifurcated guilt and sentencing procedures).

FN112. Examples include the requirement of notice of intent to seek the death penalty and the two threshold findings of at least one aggravating factor from two separate lists. See, e.g., 18 U.S.C. §§ 3591(2)(a), 3593(a), (d)-(e).

FN113. Examples include the prosecutor's broad discretion to create non- statutory aggravating factors and a relaxed evidentiary standard. See, e.g., United States v. McCullah, 76 F.3d 1087, 1106-07 (10th Cir. 1996) (holding that the prosecutor's discretion to create non-statutory aggravating factors is not an improper delegation of legislative power by Congress); United States v. Chanthadara, 928 F. Supp. 1055, 1059 (D. Kan. 1996) (holding that the relaxed evidentiary

standard for federal capital sentencing hearings does not violate the Eighth Amendment of the Constitution).

FN114. The actual text of the Federal Death Penalty Act of 1994 is not limited to the portions codified in 18 U.S.C. §§ 3591-98 (the actual procedures for implementation of a sentence of death); it includes portions now codified in Title 18 of the United States Code at sections 36, 37, 1118-21, 2245, 2280, 2281, and 2332a (making certain existing crimes death eligible and creating death eligible crimes). See Federal Death Penalty Act of 1994, Pub. L. No. 103-322, 108 Stat. 1959 (1994) (codified in main part at 18 U.S.C. §§ 3591-98 (1994) and in scattered sections of 18 U.S.C.).

FN115. See, e.g., Slain Girl's Kin Weep as Screams Replayed, Dallas Morn. News, Oct. 26, 1995, at 29A, available in 1995 WL 9068408 (purporting that the FDPA added 60 new federal capital punishment crimes); Trial Starts for First Person to Face Execution Under New U.S. Law, Hous. Chron., Oct. 2, 1995, at 17A, available in 1995 WL 9406819 (purporting that the FDPA allows for 60 more federal capital crimes). Cf. Chris Payne, Jury's Still Out on Federal Death Penalty, Dallas Morn. News, June 2, 1996, at 1A, available in 1996 WL 2126780 (purporting that the FDPA created 53 capital crimes); Coyne & Entzeroth, supra note 31, at 145 (referring to the FDPA's dramatic expansion of the number of offenses punishable by death).

FN116. See Coyne & Entzeroth, supra note 31, at 145-46.

FN117. See, e.g., 18 U.S.C. § 3591(b)(1)-(2).

FN118. See Coyne & Entzeroth, supra note 31, at 145-46.

FN119. See 18 U.S.C. §§ 3591-98.

FN120. Id. § 3591(a)(2).

FN121. See Coyne & Entzeroth, supra, note 31, at 145-46.

FN122. See id. at 148 n.4 (explaining that David Bruck of the Federal Death Penalty Resource Counsel first coined the term "zombie statutes" in reference to the statutes that became dormant after Furman).

FN123. See id. Despite being "dead" after Furman, the zombie statutes were never modified or removed from the United States Code. See id. Therefore, these "lost statutes" seem to have existed in a place analogous to Peter Pan's "Never, Never Land" in the sense that they were neither amended nor deleted and they possessed no legal effect.

FN124. See id. at 148.

FN125. 139 Cong. Rec. S459 (daily ed. Jan. 21, 1993) (statement by Senator Thurmond). In introducing the FDPA, Senator Thurmond stated:
The bill I am offering today comports with the constitutional requirements outlined by the Supreme Court and establishes the procedures for the imposition of the death penalty for the numerous Federal crimes that currently authorize a sentence of death . . . . [T]his bill [also] authorizes the death penalty for the following offenses: First, certain attempts to assassinate the President; second, murder by a Federal prisoner serving a life term in a Federal correctional institution; third, hostage taking situations where death results to the hostage, or to a person attempting to rescue a hostage or apprehend the hostage takers; fourth, murder for hire and murder in aid of racketeering activity; and fifth, genocide where death results.
Id.

FN126. See Coyne & Entzeroth, supra note 31, at 145-49 (dividing the crimes into 20 newly created crimes, 17 death eligible crimes made incorporated into the FDPA's provisions, and eight other existing crimes made death eligible for a total of 45 crimes); cf. Charles K. Eldred, The New Federal Death Penalties, 22 Am. J. Crim. L. 293, 296-98 (1994) (finding only 30 crimes). Although this number is not exactly in line with the purported "sixty new death eligible crimes," the discrepancy could be attributed to legislative puffing. See generally 140 Cong. Rec. S12,434 (daily ed. Aug. 24, 1994) (statement of Sen. Kerrey) ("That is why this bill expands the Federal death penalty to cover about 60

new offenses . . . ."); 140 Cong. Rec. S12,413 (daily ed. Aug. 24, 1994) (statement of Sen. Feinstein) ("This bill would take it up to 60 death penalty crimes."). But see 140 Cong. Rec. H2242 (daily ed. Apr. 13, 1994) (statement of Rep. Hughes) ("To a lot of members, the 50 death penalties in there are not enough, they would like to have 50 more."); 140 Cong. Rec. H2259- 05 (daily ed. April 14, 1994) (statement of Rep. Meek) ("Right or wrong, this crime bill makes 66 new crimes punishable by the death penalty."). As well, some of the crimes are possibly being counted two or three times because various derivations of the crime are punishable by death under the same statute. See, e.g., Coyne & Entzeroth, supra note 31, at 148 (counting a "violati[on of] a person's federally-protected rights based on race, religion, or national origin, where death results" as only one crime; thereby arriving at less than 60 crimes).

FN127. See Charles Kenneth Eldred, Comment, The New Federal Death Penalties, 22 Am. J. Crim. L. 293, 296-98 (1994).

FN128. See id.

FN129. See 18 U.S.C. § 2381 (1994).

FN130. See id. § 794.

FN131. See id. § 3591(b)(1).

FN132. See id. § 3591(b)(2). It should be noted that section 3591(b) is the true "Drug Kingpin Act." Although the Federal Death Penalty Act of 1988 has come to be known as the Drug Kingpin Act, that is really a misnomer. For further discussion of the confusion between the Drug Kingpin Act and section 3591(b) of the FDPA, see supra note 88 discussing the legislative history of the Drug Kingpin Act.

FN133. See Coyne & Entzeroth, supra note 31, at 148-49 (discussing the revival of these statutes by application of the procedural provisions of the FDPA).

FN134. See generally Kamenar, supra note 23, at 886-891 (contending that treason, espionage, and attempted assassination of the President were all enforceable without additional procedural safeguards because they were very narrowly drawn and affected an area of great public concern, and noting that a form of the bifurcated procedure relied on by the Court was already present). An amendment to the FDPA allowing death to be imposed on a defendant attempting assassination of the President passed the Senate but failed the House. See H.R. Conf. Rep. No. 103-711, 103d Cong., 2d Sess. (1994); 140 Cong. Rec. H8772-03, H8772-03 (daily ed. Aug. 21, 1994).

FN135. See 137 Cong. Rec. S8496-01, S8499 (daily ed. June 24, 1991) (comments by Senator Orin Hatch) ("There has always been a Federal death penalty, and there has always been a Federal death penalty for non-homicide offenses. To begin with, death has always been the traditional and accepted punishment for treason, as well as for some forms of espionage. This is true worldwide, and it is reflected in our Federal Criminal Code. . . . The Supreme Court has never said nor implied that the current prescribed penalty for treason-death-is in any way unconstitutional.").

FN136. See Kamenar, supra note 23, at 886-88 (relying on the historical use of the death penalty for crimes of treason and espionage to bolster an argument for the validity of the federal death penalty for treason, espionage, and other crimes even after Furman). The imposition of a death penalty for a non-homicide drug-related offense has no history except for its creation in the Federal Death Penalty Act of 1994. See 18 U.S.C. § 1391(b) (1994).

FN137. 433 U.S. 584 (1977) (holding the death penalty unconstitutional when imposed for the rape of an adult woman). This holding implied that virtually any sentence of death for a non-homicide crime would be struck down as unconstitutional. See id. at 592.

FN138. See Robert G. McCloskey, The American Supreme Court 160 (2d. ed. 1994).

FN139. See Kamenar, supra note 23, at 886-88; see also Coker, 433 U.S. at 598 (viewing the decision of whether a crime can be punishable by death as turning on the "moral depravity" of the crime and the "injury to the person and to

the public").

FN140. See Coker, 433 U.S. at 598 (allowing the death penalty for murder because of its injury to the public); see also Death Penalty for Drug Kingpins-Constitutional Idea Whose Time Has Come, 135 Cong. Rec. S13,684-02, S13,688 (1989), available in 1989 WL 186261; 137 Cong. Rec. S8496-01, S8497 (daily ed. June 24, 1991) (comments by Senator Strom Thurmond) ("In the case of treason or espionage, they ought to get the death penalty. Drug kingpins ought to get the death penalty. Drug kingpins, who provide drugs and cause deaths of these young people and others, ought to get the death penalty."). The Justice Department stated: [T]he Department [of Justice] is of the view that the Congress may impose the death penalty for non-homicidal crimes which imperil national security or threaten the fabric of our society, or pose a moral danger to a large number of our people. The more narrowly drawn the category of offender, so as to target those most culpable of wreaking broad societal harm, the more likely that a "drug kingpin" death penalty statute would pass constitutional muster.135 Cong. Rec. at S13,684-02, S13,688 (1989), available in 1989 WL 186261 (statement of Edward S. G. Dennis, Jr., Assistant Attorney General, Criminal Division).

FN141. See 18 U.S.C. § 3592(d); Coyne & Entzeroth, supra note 31, at 147.

FN142. See McCloskey, supra note 138, at 160 (explaining that no state in the 1980s had reimposed the death penalty for anything other than murder).

FN143. See Coyne & Entzeroth, supra note 31, at 147.

FN144. 18 U.S.C. § 3591(b)(1).

FN145. See Coyne & Entzeroth, supra note 31, at 147.

FN146. See id.

FN147. See id.

FN148. See 18 U.S.C. § 1393(a) (requiring the government to file a notice of intent to seek the death penalty).

FN149. See id.

FN150. See id.

FN151. See id.

FN152. See id.; see also Lankford v. Idaho, 500 U.S. 110 (1991) (holding that the defendant is entitled to notice of intent to seek the death penalty according to the Due Process Clause of the Fifth Amendment); Coyne & Entzeroth, supra note 31, at 151-52 (noting that the FDPA's notice of intent to seek the death penalty goes beyond the requirements of Lankford by mandating that the notice be received before trial).

FN153. See 21 U.S.C. § 848 (1994).

FN154. See Lankford, 500 U.S. at 127.

FN155. Courts are likely to interpret "reasonable time" as only a few days before trial. According to the Lankford Court, any notice served before trial is in compliance with the Fifth Amendment's due process guarantees. See id.

FN156. For insight into how the Court might treat a violation of the statute, see Nichols v. Reno, 931 F. Supp. 748 (D. Colo. 1997), aff'd, 124 F.3d 1376 (10th Cir. 1997) (holding that the Attorney General's violation of the United States Attorney's Manual by announcing she would seek the death penalty before any intent to seek the death penalty was filed or sent to the defendant did not violate the defendant's due process rights or the FDPA because the language of the

United States Attorney's Manual was not implicitly read into the FDPA). Therefore, Nichols seems to imply that a violation of the FDPA's notice requirement would violate the defendant's due process rights because the notice requirement is contained in the statute.

FN157. See 18 U.S.C. § 3593(a)(1) (providing notice); id. § 3593(a)(2) (providing information regarding aggravating factors the government will seek to prove).

FN158. See id. § 3593(a)(1). This requirement was not present in the Drug Kingpin Act. See 21 U.S.C. § 848(h)(1)(A).

FN159. See 18 U.S.C. § 3593(a)(2).

FN160. Compare id. § 3593(a)(1) with 21 U.S.C. § 848 (h)(1)(A).

FN161. See United States v. McVeigh, 944 F. Supp. 1478 (D. Colo. 1996) (entertaining challenges to the review provisions of the FDPA and the Government's notice of intent to seek the death penalty and the particular aggravating factors alleged by the Government); United States v. Nguyen, 928 F. Supp. 1525 (D. Kan. 1996) (entertaining a comprehensive list of challenges to the FDPA and the particular aggravating factors alleged); United States v. Chanthadara, 928 F. Supp. 1055 (D. Kan. 1996) (entertaining challenges to the evidentiary standards of the sentencing hearing, procedures followed by the Government, categories of substantive offenses, and aggravating factors); United States v. Davis, 912 F. Supp. 938 (E.D. La. 1996) (determining the validity of various non-statutory aggravating factors); United States v. Davis, 940 F. Supp. 554 (E.D. La. 1995) (entertaining various challenges to the federal statutory capital sentencing scheme).

FN162. See United States v. Roman, 931 F. Supp. 960 (D. R.I. 1996).

FN163. See 18 U.S.C. § 3593(a).

FN164. See id.

FN165. See id. § 3593(b) (providing that the defendant must be found guilty of a crime subject to the death penalty before the sentencing hearing can be held).

FN166. See id. § 3593(a); see also 21 U.S.C. § 848(h)(1)(B) (1994).

FN167. See 18 U.S.C. § 3593(a). A showing of "good cause" might be found in situations where no evidence arises during the trial. The FDPA seems to leave the determination of "good cause" to the discretion of the trial judge. See id.

FN168. See id. § 3593(b).

FN169. Id. § 3593.

FN170. See id. § 3593(b).

FN171. See id. (referring to the requirements of § 3593(a)).

FN172. See id. (referring to the requirements of § 3591).

FN173. See id. § 3593(b)(2) (giving four examples of special circumstances where a new jury is impaneled: (1) the defendant plead guilty at the trial stage, (2) the defendant was convicted by a judge at the trial stage, (3) the original jury was discharged for a good cause, or (4) the hearing was conducted as part of a remand or reconsideration of the original sentence); see also id. § 3593(b)(3) (allowing the district court judge to make the decision if the defendant

requests and the Government gives its approval).

FN174. See id. § 3593(b).

FN175. See Gregg v. Georgia, 428 U.S. 153, 190-91 (1976).

FN176. See 18 U.S.C. §§ 3591-98.

FN177. See id. § 3594 (binding the judge to the jury's determination of a sentence of death).

FN178. See id. (stating that the court "shall" impose a sentence of death upon a recommendation by the jury).

FN179. See Gregg, 428 U.S. at 206 (interpreting the requirements of Furman).

FN180. See 18 U.S.C. § 3592.

FN181. The non-homicide death-eligible offenses are treason, espionage, and the two drug offenses authorized under section 3591(b). See id. § 3591(a)(1) (referencing 18 U.S.C. § 794, espionage, and 18 U.S.C. § 2381, treason); id. § 3591(b).

FN182. See Eldred, supra note 127, at 296-98.

FN183. See 18 U.S.C. § 3591(a)(2).

FN184. See id.

FN185. See id. § 3591(a)(2)(A)-(B).

FN186. Id. § 3591(a)(2)(C)-(D).

FN187. See id. § 3591(a)(2).

FN188. See id. § 3593(d) ("If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.").

FN189. See id. § 3593(a)(2).

FN190. See id. § 3593(c) ("The government may present any information relevant to an aggravating factor for which notice has been provided under subsection (a)."). Although the government is technically limited to the aggravating factors for which notice has been provided, the government is provided with a statutory rescue. See id.; id. § 3593(a)(2). If the government can show "good cause," the court has the discretion to allow the government to amend its notice of intent to seek the death penalty. See id. § 3593(a)(2). The FDPA gives no indication of the sort of circumstances which would satisfy the "good cause" standard, but a court is likely to use this vague language to the advantage of the government in cases where new evidence is discovered in a gruesome murder.

FN191. See id. § 3592(b)-(d).

FN192. See id. § 3593(e) (referring the Government to the appropriate aggravating factor list depending on the type of crime); see also id. § 3592(b)-(d) (providing the three lists of aggravating factors depending on the type of crime).

FN193. See id. § 3592(c). The factors are: death during commission of another crime; previous conviction of violent

felony involving firearm; previous conviction of an offense for which a sentence of death or life imprisonment was authorized; previous conviction of other serious offenses; grave risk of death to additional persons; heinous, cruel, or depraved manner of committing the offense; procurement of the offense by payment, pecuniary gain; substantial planning and premeditation; conviction for two felony drug offenses; vulnerability of the victim; conviction for serious federal drug offenses; continuing criminal enterprise involving drug sales to minors; offense committed against a high public official; prior conviction of sexual assault or child molestation; and multiple killings or attempted killings. See id.

FN194. See id. § 3592(b). The factors are: prior espionage or treason offense, grave risk to national security, and grave risk of death. See id.

FN195. See id. § 3592(d). The factors are: previous conviction of an offense for which a sentence of death or life imprisonment was authorized, previous conviction of other serious offenses, previous serious drug felony conviction, use of firearms, distribution to persons under 21, distribution near schools, using minors in trafficking, and lethal adulterant. See id. This list might be a well-crafted attempt by Congress to get around the serious constitutional problems implied in Coker v. Georgia, 433 U.S. 584, 592 (1977), which held that the death penalty is unconstitutional for rape of an adult woman and thereby implied that the death penalty might well be unconstitutional for any non-homicide offense. See Coyne & Entzeroth, supra note 31, at 147.

FN196. See 21 U.S.C. § 848(e)(1) (1994) (requiring an "intentional killing"); id. § 848(k) (requiring a finding of at least one aggravating factor relating to intent and a finding of at least one other aggravating factor).

FN197. See id. § 848(e)(1).

FN198. See id. § 848(k); id. § 848(n)(1). Section 848(k) states: "If one of the aggravating factors set forth in subsection (n)(1) of this section and another of the aggravating factors set forth in paragraphs (2) through (12) of subsection (n) of this section is found to exist" the jury may consider other aggravating factors. Id. § 848(k) (emphasis added). The section reiterates the same proposition again: "If an aggravating factor set forth in subsection (n)(1) of this section and one or more of the other aggravating factors set forth in subsection (n) of this section are found to exist" the jury shall weigh all of the aggravating and mitigating factors to decide if death is justified. Id. (emphasis added). Section 848(n)(1) provides the following aggravating factors:

The defendant-(A) intentionally killed the victim; (B) intentionally inflicted serious bodily injury which resulted in the death of the victim; (C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim; (D) intentionally engaged in conduct which-(i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and (ii) resulted in the death of the victim.

Id. § 848(n)(1).

FN199. See United States v. McCullah, 76 F.3d 1087, 1111 (10th Cir. 1996), cert. denied, 117 S. Ct. 1699 (1997).

FN200. See 21 U.S.C. § 848(k); id. §§ 848(n)(2)-(12). Sections 848(n)(2)-(12) provide additional aggravating factors similar to the list of aggravating factors for homicide and drug offenses under section 3592 of the FDPA. Compare 21 U.S.C. § 848(n)(2)-(12) with 18 U.S.C. § 3592(c)- (d) (1994).

FN201. See 21 U.S.C. § 848(j) ("The burden of establishing the existence of any aggravating factor is on the Government, and is not satisfied unless established beyond a reasonable doubt.").

FN202. The last sentence of each list of aggravating factors states: "The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists." 18 U.S.C. § 3592(b)-(d). The Drug Kingpin Act also provides for the prosecutor's creation of non-statutory aggravating factors. See 21 U.S.C. § 848(k) ("[A] special finding identifying any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section, may be returned.").

FN203. See 18 U.S.C. § 3593(d) (establishing that the jury may return a finding for "any other aggravating factor for

which notice has been provided under subsection (a) found to exist"); see also 21 U.S.C. § 848(d) (establishing the same requirement).

FN204. See, e.g., McCullah, 76 F.3d at 1106-07 (holding that prosecutorial discretion is not an improper delegation of power); United States v. Pretlow, 779 F. Supp. 758, 767-68 (D. N.J. 1991) (same).

FN205. See, e.g., McCullah, 76 F.3d at 1106-10. These challenges resemble typical challenges to legislation. In essence, the prosecutor's non-statutory aggravating factors are viewed as legislation. See id.

FN206. See, e.g., id. at 1111; United States v. Tipton, 90 F.3d 861, 897- 901 (4th Cir. 1996), cert. denied, 117 S. Ct. 2414 (1997).

FN207. See, e.g., McCullah, 76 F.3d at 1107; Pretlow, 779 F. Supp. at 767-68.

FN208. See, e.g., McCullah, 76 F.3d at 1111; Tipton, 90 F.3d at 897-901.

FN209. See Tipton, 90 F.3d at 897-901.

FN210. See United States v. Flores, 63 F.3d 1342, 1373 (5th Cir. 1995), cert. denied, 117 S. Ct. 87 (1996).

FN211. Because most prosecutors likely possess no experience in drafting legislation, those that create non-statutory aggravating factors could shoot themselves in the foot. See David E. Rovella, Preparing for the Penalty Phase, Nat'l L.J., May 12, 1997, at A1. "Mr. Bright of the Southern Center for Human Rights says the government shot itself in the foot by using non-statutory factors in its declaration of intent to seek the death penalty. . . . 'Why, in a case like this, would the government want to take a chance?' he asks." Id.

FN212. See Gregg v. Georgia, 428 U.S. 153, 206 (1976).

FN213. See id.

FN214. See id.

FN215. See, e.g., 18 U.S.C. § 3592(c)(2)-(4),(10),(12),(15) (providing various aggravating factors relating to the record of the defendant).

FN216. See id. § 3592(a).

FN217. See id.

FN218. See id. § 3593(c).

FN219. See id. § 3592(a). The seven statutorily defined mitigating factors are: impaired capacity, duress, minor participation, equally culpable defendants, no prior criminal record, mental or emotional disturbance, and victim's consent. See id. The Drug Kingpin Act also provides for statutory mitigating factors. See 21 U.S.C. § 848(m) (1994). The Drug Kingpin Act contains nine statutorily defined mitigating factors. See id. § 848(m)(1)- (9). Seven of these factors mirror the seven mitigating factors appearing in the FDPA. See id. The other two mitigating factors in the Drug Kingpin Act are the defendant's inability to foresee the grave risk created by the act and the youthfulness of the defendant. See id. The legislative history of the FDPA gives no indication why Congress left these two factors out of the FDPA.

FN220. See 18 U.S.C. § 3592(a)(8). The Drug Kingpin Act also provides for the inclusion of non-statutory mitigating factors. See 21 U.S.C. § 848(m)(10). Both the FDPA and Drug Kingpin Act use language substantially mirroring the requirement of Gregg that the jury's discretion be focused on the record and characteristics of the individual defendant.

Compare 18 U.S.C. § 3592(a)(8) (providing for the inclusion of other mitigating factors focusing on the "defendant's background, record, or character") (emphasis added), and 21 U.S.C. § 848(m)(10) (providing for the inclusion of other mitigating factors focusing on the "defendant's background or character") (emphasis added), with Gregg, 428 U.S. at 206 (providing that the discretion of the jury be focused on the record and characteristics of the defendant).

FN221. See 18 U.S.C. § 3593(a)(2).

FN222. The FDPA lacks any reference to the defendant's responsibility to submit mitigating factors before trial.

FN223. See id. § 3593(c).

FN224. See id.

FN225. See id.

FN226. See id.; see also id. § 3593(d) (explaining that a jury "shall consider all the information received during the hearing" and make a decision).

FN227. See id. § 3593(c).

FN228. See id.

FN229. See id. This represents a small change from the Drug Kingpin Act, which allows the government and the defendant to present any evidence "related to" the sentencing hearing. See 21 U.S.C. § 848(j) (1994).

FN230. See 18 U.S.C. § 3593(c). The Drug Kingpin Act allows any evidence "related to" the aggravating factors or the mitigating factors. See 21 U.S.C. § 848(j).

FN231. See 18 U.S.C. § 3593(c). This requirement is closely fashioned after the relevancy standard of Federal Rule of Evidence 403; however, it omits the word "substantially" prior to the word "outweighed." See Fed. R. Evid. 403.

FN232. See Fed. R. Evid. 403.

FN233. See 18 U.S.C. § 3593(c); Fed. R. Evid. 403.

FN234. See Fed. R. Evid. 403.

FN235. See 21 U.S.C. § 848(j).

FN236. See 18 U.S.C. § 3593(c).

FN237. Because the FDPA does not require that the probative value "substantially" outweigh the danger of unfair prejudice, the FDPA's evidentiary standard makes it more likely that borderline evidence will be excluded.

FN238. See 18 U.S.C. § 3593(c).

FN239 See id.

FN240. See id.

FN241. See id.

FN242. See id.

FN243. See id. § 3593(c)-(d).

FN244. See id. § 3593(e).

FN245. See id. §§ 3591(a)(2), 3593(d); Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

FN246. See 18 U.S.C. § 3592; supra note 70 and accompanying text.

FN247. See 18 U.S.C. § 3593(e).

FN248. See Rovella, supra note 211, at A1 (explaining that non-weighing jurisdictions allow just one mitigating factor to prevent the imposition of the death penalty, whereas weighing jurisdictions allow the jury to weigh the aggravating factors against the mitigating factors to determine whether to impose a sentence of death).

FN249. See 18 U.S.C. § 3593(d).

FN250. See id.

FN251. See id.

FN252. See id. § 3593(d)-(e).

FN253. See id. § 3593(d).

FN254. See id.

FN255. See Rovella, supra note 211, at A1 (noting that burdens of proof and weighing procedures do not really affect the outcome because "'[p]eople make decisions emotionally and then construct an objective framework.'").

FN256. See 18 U.S.C. § 3593(d).

FN257. See 21 U.S.C. § 848(k) (1994) (explaining that the "jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed").

FN258. See id.

FN259. See Peyton Robinson, Judge Over Jury: Judicial Discretion in the Federal Death Penalty Under the Drug Kingpin Act, 45 U. Kan. L. Rev. 1491, 1498 (1997) (emphasizing that because the Drug Kingpin Act allowed the jury to disregard its findings and refuse to impose a sentence of death, the federal death penalty scheme violated the requirements of Furman and the standards of Gregg).

FN260. See 18 U.S.C. §§ 3591-98.

FN261. See Rovella, supra note 211, at A1.

FN262. See 18 U.S.C. § 3593(d)-(e).

FN263. See United States v. McCullah, 76 F.3d 1087, 1111-12 (10th Cir. 1996), cert. denied, 117 S. Ct. 1699 (1997).

FN264. See id.

FN265. See Stringer v. Black, 503 U.S. 222, 232 (1992).

FN266. See id.

FN267. Compare McCullah, 76 F.3d at 1111-14 (remanding to the trial court for reweighing), with United States v. Tipton, 90 F.3d 861, 898-901 (4th Cir. 1996) (reweighing the factors and finding harmless error), cert. denied, 117 S. Ct. 2414 (1997).

FN268. 76 F.3d at 1114.

FN269. See id. at 1111.

FN270. See id.

FN271. See id.

FN272. Id. (quoting 21 U.S.C. § 848(n)(1)(C) (1994)).

FN273. Id. (quoting the indictment's non-statutory aggravating factor).

FN274. Id.

FN275. See id.

FN276. See id.; 21 U.S.C. § 848(n)(1)(D).

FN277. 21 U.S.C. § 848(n)(1)(D).

FN278. See McCullah, 76 F.3d at 1111.

FN279. See id. (citing Stringer v. Black, 503 U.S. 222, 230-32 (1992)).

FN280. Id.

FN281. See id. at 1112; 21 U.S.C. § 848(k); see also 18 U.S.C. § 3593(e) (1994) (providing for the same weighing system as the Drug Kingpin Act).

FN282. McCullah, 76 F.3d at 1112 (quoting Stringer, 503 U.S. at 232).

FN283. See id. at 1112, 1114.

FN284. See id. (citing Stringer, 503 U.S. at 232).

FN285. See id.

FN286. See United States v. Tipton, 90 F.3d 861 (4th Cir. 1996).

FN287. See id. at 892-901.

FN288. See id. at 898-99; 21 U.S.C. § 848(n)(1) (1994). The section 848(n)(1) statutory aggravating factor

encompasses an intent requirement, and includes four separate factors-one of which must be found before the jury can impose a sentence of death. See 21 U.S.C. § 848(n)(1). Section 848(n)(1) provides:

The defendant-(A) intentionally killed the victim; (B) intentionally inflicted serious bodily injury which resulted in the death of the victim; (C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim; (D) intentionally engaged in conduct which-(i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and (ii) resulted in the death of the victim.

Id.

FN289. See Tipton, 90 F.3d at 898, 902.

FN290. See id. at 898-99.

FN291. See id. at 899.

FN292. See id.

FN293. See id. (holding that the four sub-factors of 848(n)(1) were not meant to be found simultaneously, and recognizing that the intent of 848(n)(1) was to "focus the jury's attention upon the different levels of moral culpability" involved in the crime, thereby channeling the jury's discretion).

FN294. See id. (citing Stringer v. Black, 503 U.S. 222, 230-32 (1992)).

FN295. See id. at 899 n.22; Stringer, 503 U.S. at 230-32.

FN296. See Tipton, 90 F.3d at 899 (citing Clemons v. Mississippi, 494 U.S. 738, 754 (1990)).

FN297. See id.

FN298. See id. at 901.

FN299. See id. at 900.

FN300. See id.

FN301. See id.

FN302. See id.

FN303. See id. But cf. United States v. McCullah, 76 F.3d 1087, 1111-12 (10th Cir. 1996) (deciding that although the statutory factors were not absolutely identical, the fact that one factor subsumed the other was enough overlapping to warrant reversal and remand for reweighing), cert. denied, 117 S. Ct. 1699 (1997). Here, the Fourth Circuit used the fact of subsumption to help prove the harmlessness of the district court's erroneous instruction. See Tipton, 90 F.3d at 900.

FN304. See Tipton, 90 F.3d at 900.

FN305. See id.

FN306. See id.

FN307. See id. at 901.

FN308. Id.

FN309. Id.

FN310. See 18 U.S.C. § 3593(e) (1994).

FN311. See id.

FN312. See id.

FN313. See id. § 3594 ("Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly."). Although the jury is technically making a "recommendation" to the court, the jury's recommendation is more aptly characterized as a final determination or a mandate. See Robinson, supra note 265, at 1498-99.

FN314. 18 U.S.C. § 3594 ("Otherwise, the court shall impose any lesser sentence that is authorized by law.").

FN315. See id. § 3593(e) (allowing the jury to vote for death, life imprisonment without parole, or some other lesser sentence).

FN316. Compare id. ("Based upon this consideration, the jury by unanimous vote . . . shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence."), with 21 U.S.C. § 848(k) (1994) ("Based upon this consideration, the jury by unanimous vote . . . shall recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence.").

FN317. See 18 U.S.C. § 3593(e).

FN318. See 21 U.S.C. § 848(k).

FN319. See id. § 848(l) ("Otherwise the court shall impose a sentence, other than death, authorized by law.").

FN320. See 18 U.S.C. § 3593(e).

FN321. See id. § 3594 ("Otherwise, the court shall impose any lesser sentence that is authorized by law."). But cf. United States v. Jones, 132 F.3d 232, 243 (5th Cir. 1998) (noting that the failure to reach a unanimous decision regarding sentencing would result in a second hearing in front of a second jury impaneled for that purpose).

FN322. See 18 U.S.C. § 3593(c)-(e).

FN323. See id.

FN324. See id. § 3595. The Drug Kingpin Act also provides for the defendant's right to appeal a death sentence. See 21 U.S.C. § 848(q).

FN325. See 18 U.S.C. § 3595(a).

FN326. See Clemons v. Mississippi, 494 U.S. 738, 749 (1990); Pulley v. Harris, 465 U.S. 37, 45 (1984); Gregg v. Georgia, 428 U.S. 153, 195, 198, 204-06 (1976); Proffitt v. Florida, 428 U.S. 242, 253 (1976).

FN327. See 18 U.S.C. § 3595(b).

FN328. Id. § 3595(c)(1).

FN329. See id. § 3595(2)(A)-(C).

FN330. Id. § 3595(c)(2)(A).

FN331. Id. § 3595(c)(2)(B).

FN332. Id. § 3595(c)(2)(C).

FN333. See id. § 3595(c)(2).

FN334. The Georgia death penalty statute at issue in Gregg required the Georgia Supreme Court to automatically review every case and to compare the case with cases of other defendants who were similarly situated. See Gregg v. Georgia, 428 U.S. 153, 166-67 (1976).

FN335. See Robinson, supra note 259, at 1494. According to one commentator:
[T]he provision for an absolute jury determination of the life or death of a defendant under the Drug Kingpin Act assures inconsistent and unfair results. The similar jury provision under the Federal Death Penalty Act of 1994 suffers from the same fundamental problem. The balancing of accuracy and uniformity in the hands of various and varied juries is doomed to end in the arbitrary and capricious results the Supreme Court determined to be unconstitutional in Furman. Id.

FN336. See 18 U.S.C. § 3593(b)(3) (allowing the court to act as decision- maker upon motion by the defendant and approval of the government).

FN337. See generally Robinson, supra note 259, at 1508-10 (arguing that the FDPA and the Drug Kingpin Act's vesting of full discretion with the jury creates disparate results among federal decisions due to the large geographic domain and the demographic differences among the federal courts). Robinson stated, "Like all federal laws, the [Drug Kingpin Act and FDPA] should be applied consistently throughout the country." Id.

FN338. See 18 U.S.C. § 3595.

FN339. See Jack Douglas, Jr., Appeals Could Tie Case Up for Years, Fort Worth Star-Telegram, June 3, 1997, at 19, available in 1997 WL 4845753; see also Roberto Suro, Decision May Become Benchmark in Capital Punishment Debate, Wash. Post, June 14, 1997, at A10, available in 1997 WL 11161041 (explaining that McVeigh will join the ranks of twelve federal death row inmates).

FN340. 944 F. Supp. 1478 (D. Colo. 1996); see also United States v. McVeigh, 958 F. Supp. 512 (D. Colo. 1997) (construing the Victim Rights Clarification Act of 1997).

FN341. The judge has issued opinions for his pre-trial decisions over the FDPA for both defendants in the Oklahoma City Bombing; Timothy McVeigh and Terry Nichols. See McVeigh, 958 F. Supp. at 512. In addition, Judge Matsch has published the full text of many of the briefs and trial transcripts involved in the case, and they are available in a special Westlaw Database called "Okla- Trans," "McVeigh-Trans," or "Nichols-Trans." See, e.g., 1995 WL 967977 (W.D. Okla. Doc.) ("Memorandum in Support of Motion to Strike Notice of Intention To Seek the Death Penalty as to Defendant Timothy James McVeigh"); 1995 WL 747110 (W.D. Okla. Doc.) ("Brief of the United States in Opposition to Defendant's Motions to Strike to the Notices of Intent to Seek the Death Penalty"); 1996 WL 11794 (W.D. Okla. Doc.) ("Reply Brief of Defendant Timothy James McVeigh in Support of Motion to Strike the Notice of Intention to Seek the Death Penalty"). Finally, Terry Nichols also brought a civil action against Attorney General Janet Reno, and the Fourth Circuit has already heard the appeal in that case. See Nichols v. Reno, 931 F. Supp. 748 (D. Colo. 1996), aff'd, 124 F.3d 1376 (10th Cir. 1997).

FN342. See Suro, supra note 339, at A10 (prophesizing the benchmark status of McVeigh because of the rareness of the crime and the ease with which society will overwhelmingly condemn the criminal).

FN343. 132 F.3d 232 (5th Cir. 1998).

FN344. See id. at 237.

FN345. Appellant's Initial Brief at 6, United States v. Jones, 132 F.3d 232 (5th Cir. 1998) (Nos. 96-10113, 96-10448).

FN346. See Jones, 132 F.3d at 237.

FN347. See id.

FN348. See id.; see also Appellant's Initial Brief at 18, Jones (Nos. 96- 10113, 96-10448) ("Surprisingly, Sandy did not report this alleged incident to authorities until prompted to do so by the [Air Force investigators] on March 1, 1995-nearly two weeks after the incident allegedly occurred.").

FN349. See Jones, 132 F.3d at 237.

FN350. See id.

FN351. See id.

FN352. See id.

FN353. Appellant's Initial Brief at 5, Jones (Nos. 96-10113, 96-10448); see Jones, 132 F.3d at 237-39.

FN354. See Appellant's Initial Brief at 5, Jones (Nos. 96-10113, 96-10448); ("On September 13, 1995, the government gave notice of its intention to seek the death penalty in the event Jones was convicted of the offense charged in Count 1. On October 16 through October 23, 1995, Jones was tried by jury before the Honorable Sam R. Cummings in the Northern District of Texas, Lubbock Division. On October 23, 1995, the jury returned a verdict of guilty against Jones on both counts. On October 24 through November 3, 1995, a separate sentencing hearing was held before the same jury that decided guilt/innocence.").

FN355. See Jones, 132 F.3d at 238; see also 18 U.S.C. § 3591(a) (1994) (requiring a finding of at least one of the four factors before the jury can impose a death sentence). The jury found both that "Jones intentionally killed McBride," and that "Jones intentionally inflicted seriously [sic] bodily injury that resulted in the death of McBride." Jones, 132 F.3d at 238.

FN356. See Jones, 132 F.3d at 238.

FN357. See id. The two statutory aggravating factors found by the jury were that "Jones caused the death of the victim or the injury resulting in the death of the victim during the commission of the offense of kidnapping; and Jones committed the offense in an especially heinous, cruel, and depraved manner." Id.

FN358. See id. The jury found the following two non-statutory aggravating factors: "McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas; and McBride's personal characteristics and the effect of the offense on her family." Id.

FN359. See id. In a footnote, the Fifth Circuit provided a break-down of the 11 mitigating factors submitted to the jury with the number of jurors finding each factor to exist by a preponderance of the evidence: "(1) the defendant Louis Jones did not have a significant prior criminal record [6]; (2) the defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform to the requirements of the law was significantly impaired, regardless of whether

the capacity was so impaired as to constitute a defense to the charge [2]; (3) the defendant committed the offense under severe mental or emotional disturbance [1]; (4) the defendant was subjected to physical, sexual, and emotional abuse as a child (and was deprived of sufficient parental protection that he needed) [4]; (5) the defendant served his country well in Desert Storm, Grenada, and for 22 years in the United States Army [8]; (6) the defendant is likely to be a well-behaved inmate [3]; (7) the defendant is remorseful for the crime he committed [4]; (8) the defendant's daughter will be harmed by the emotional trauma of her father's execution [9]; (9) the defendant was under unusual and substantial internally generated duress and stress at the time of the offense [3]; (10) the defendant suffered from numerous neurological or psychological disorders at the time of the offense [1]; and (11) other factors in the defendant's background or character militate against the death penalty [0]. Additionally, seven jurors added Jones's ex-wife Sandra Lane as a mitigating factor." Id. at 238 n.3. Although one of the factors was not found by any of the juror's, the addition of the defendant's ex-wife as a mitigating factor brought the total mitigating factors found by the jury back up to 11. See id.

FN360. See id. at 239.

FN361. See id. at 237.

FN362. See id.

FN363. See id.

FN364. See id.; Furman v. Georgia, 408 U.S. 238, 239 (1972). However, note that in Jones, unlike Furman, the Eighth Amendment was not being applied through the Fourteenth Amendment because the Eighth Amendment is already applicable to the federal government. See Jones, 132 F.3d at 239-42. The Fourteenth Amendment made the Eight Amendment's prohibition against "cruel and unusual punishment" applicable to the state death penalty procedures in Furman. See Furman, 408 U.S. at 239.

FN365. See Jones, 132 F.3d at 239.

FN366. See id. at 239-42. The defendant also raised a constitutional challenge to the FDPA, alleging that it was per se unconstitutional because all impositions of a sentence of death are unconstitutional under the "cruel and unusual punishment clause" of the Eighth Amendment. See id. at 242. The Fifth Circuit quickly and summarily rejected this argument, citing to Gregg v. Georgia and McCleskey v. Kemp. See id. (citing McCleskey v. Kemp, 481 U.S. 279, 300-03 (1987); Gregg v. Georgia, 428 U.S. 153, 96 (1976)).

FN367. See Rovella, supra note 211, at A9; Jack Douglas, Jr., Appeals Could Tie Cases Up for Years, Fort Worth Star-Telegram, June 3, 1997, at 19, available in 1997 WL 4845753.

FN368. See Jones, 132 F.3d at 239-40.

FN369. See id. at 239 (citing Touby v. United States, 500 U.S. 160, 165 (1991); United States v. Mistretta, 488 U.S. 361, 371 (1989)).

FN370. Id. (citing Mistretta, 488 U.S. at 372).

FN371. Id. (citing United States v. Tipton, 90 F.3d 861, 895 (4th Cir. 1996), cert. denied, 117 S. Ct. 2414 (1997)); accord Mistretta, 488 U.S. at 390; United States v. McCullah, 76 F.3d 1087, 1106-07 (10th Cir. 1996), cert. denied, 117 S. Ct. 1699 (1997).

FN372. See Jones, 132 F.3d at 239 (citing United States v. Armstrong, 517 U.S. 456 (1996); United States v. Johnson, 91 F.3d 695, 698 (5th Cir. 1996)).

FN373. See id. at 239-40.

FN374. See id. at 240 (citing 18 U.S.C. § 3593(a) (1994)).

FN375. See id. (citing Zant v. Stephens, 462 U.S. 862, 877 (1983) (holding that the Fifth Amendment "due process clause" requires aggravating factors to genuinely narrow the class of death eligible defendants)); see also Gregg, 428 U.S. at 206 (holding that the Eighth Amendment requires a jury's discretion to be narrowed).

FN376. See **Jones, 132 F.3d at 240** (citing 18 U.S.C. § 3593(c)).

FN377. See id. (citing 18 U.S.C. § 3593(d)).

FN378. See, e.g., United States v. Tipton, 90 F.3d 861, 895 (4th Cir. 1996); United States v. McCullah, 76 F.3d 1087, 1106-07 (10th Cir. 1996), cert. denied, 117 S. Ct. 1699 (1997).

FN379. See, e.g., Zant, 462 U.S. at 878.

FN380. See **Jones, 132 F.3d at 240-42**.

FN381. See **Id. at 240** (citing Pulley v. Harris, 465 U.S. 37, 43, 44-45 (1984)).

FN382. See e.g., Baldus, supra note 47, at 1585.

FN383. See **Jones, 132 F.3d at 240 (citing Pulley, 466 U.S. at 43, 44-45)**.

FN384. See id.

FN385. See supra notes 335, 337 and accompanying text (explaining the FDPA's evidentiary standard).

FN386. See **Jones, 132 F.3d at 241**.

FN387. See **id. at 242**; see supra notes 231-37 and accompanying text..

FN388. See **Jones, 132 F.3d at 241-42**.

FN389. **Id. at 242** (citing United States v. Nguyen, 928 F. Supp. 1525, 1546-47 (D. Kan. 1996)).

FN390. See id. (citing Jurek v. Texas, 428 U.S. 262, 276 (1976)).

FN391. See supra notes 231-37 and accompanying text. As the Fifth Circuit noted, the evidentiary standard under the FDPA actually excludes more prejudicial information than the Federal Rules of Evidence. See **Jones, 132 F.3d at 241 n.7**; 18 U.S.C. § 3593(c) (1994).

FN392. See **Jones, 132 F.3d at 242**.

FN393. See **id. at 242-53**.

FN394. See **id. at 248-50**.

FN395. See **id. at 250-52**.

FN396. See **id. at 248**.

FN397. Id. The factor was based on 18 U.S.C. § 3592(c)(1) (1994). See id.

FN398. **Id. at 249**. The factor was based on 18 U.S.C. § 3592(c)(6). See id.

FN399. See **id. at 248-50**.

FN400. See **id. at 248** (citing Zant v. Stephens, 462 U.S. 862, 877 (1983)). This requirement originated in the Supreme Court's holding in Gregg. See Gregg v. Georgia, 428 U.S. 153, 206 (1976).

FN401. See **Jones, 132 F.3d at 249** (citing Tuilaepa v. California, 512 U.S. 967, 976 (1994)). This requirement also originated in the Supreme Court's holding in Gregg. See 428 U.S. at 206.

FN402. See **Jones, 132 F.3d at 248** (citing Lowenfield v. Phelps, 484 U.S. 231, 244 (1987)). The Fifth Circuit seemed to be referring to the Supreme Court's holding in Jurek, where the jury's discretion was narrowed at the trial stage through the use of a specially defined "capital murder" charge, and the Supreme Court's holding in Gregg, where the jury's discretion was narrowed at the penalty phase through the use of aggravating factors. See Jurek v. Texas, 428 U.S. 262, 266-67 (1976); Gregg, 428 U.S. at 205.

FN403. See **Jones, 132 F.3d at 248**.

FN404. See id.

FN405. See id. (citing Lowenfield v. Phelps, 484 U.S. 231, 244 (1987)).

FN406. See id. at 249.

FN407. See id.

FN408. See 18 U.S.C. § 1201 (1994).

FN409. See **Jones, 132 F.3d at 249**.

FN410. See id.

FN411. See id. The jury considered whether "the defendant Louis Jones committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse to Tracie Joy McBride." Id.

FN412. See id. (citing Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988)).

FN413. See id. (citing United States v. Flores, 63 F.3d 1342, 1372 (5th Cir. 1995) (quoting Tuilaepa v. California, 512 U.S. 967, 975 (1994))).

FN414. See id.

FN415. Id.

FN416. See id. at 258 n.12.

FN417. Id. at 249-50 (referencing Fifth Circuit jurisprudence, specifically Flores, 63 F.3d at 1373).

FN418. See id. at 250.

FN419. Id. The government also submitted one other aggravating factor to the jury: "The defendant constitutes a future danger to the lives and safety of other persons as evidenced by specific acts of violence by the defendant Louis Jones." Id. However, the jury did not unanimously find that this aggravating factor was established beyond a reasonable doubt

by the government. See id.

FN420. Id.

FN421. See id. at 251.

FN422. Id. at 250-51 (citing United States v. McCullah, 76 F.3d 1087, 1111 (10th Cir. 1996), cert. denied, 117 S. Ct. 1699 (1997)).

FN423. Id. at 251 (citing Stringer v. Black, 503 U.S. 222, 232 (1992)).

FN424. See id.

FN425. See id. The court did not address the defendant's challenge that the non-statutory aggravating factors were overbroad. Whether the court failed to address this challenge because the factors were already deemed invalid by the duplicative challenge and the vagueness challenge, or because the overbroad challenge was an invalid challenge, is not entirely clear from the opinion.

FN426. See id. at 249 (citing Maynard v. Cartwright, 486 U.S. 356, 361- 62 (1988)).

FN427. See id. at 251. Once again, the Fifth Circuit impliedly relied on the Supreme Court's requirements enunciated in Gregg. See Gregg v. Georgia, 428 U.S. 153, 206 (1976).

FN428. **Jones, 132 F.3d at 251.**

FN429. See id. at 250 n.12.

FN430. See id. at 251.

FN431. See id. (quoting Maynard, 486 U.S. at 361-62).

FN432. See id.

FN433. See United States v. McCullah, 76 F.3d 1087, 1111 (10th Cir. 1996), cert. denied, 117 S. Ct. 1699 (1997).

FN434. Stringer v. Black, 503 U.S. 222 (1992).

FN435. See **Jones, 132 F.3d at 251.**

FN436. See id.

FN437. See id. (citing Clemons v. Mississippi, 494 U.S. 738, 741 (1990)).

FN438. Stringer v. Black, 503 U.S. 222, 232 (1992).

FN439. Id.

FN440. See id.

FN441. See id.

FN442. Id. at 235 (referencing the Court's holding in Zant v. Stephens, 462 U.S. 862 (1983)).

FN443. See United States v. McCullah, 76 F.3d 1087, 1111 (10th Cir. 1996), cert. denied, 117 S. Ct. 1699 (1997).

FN444. See Henry v. Wainwright, 661 F.2d 56, 59 (5th Cir. 1981) ("Guarding against the arbitrary and discriminatory imposition of the death penalty must not become simply a guessing game played by a reviewing court in which it tries to discern whether the improper nonstatutory aggravating factors exerted a decisive influence on the sentence determination.").

FN445. See United States v. Tipton, 90 F.3d 861, 899 n.22 (1996).

FN446. See United States v. **Jones, 132 F.3d 232, 252 (5th Cir. 1998).**

FN447. See id.

FN448. See id. (citing Stringer v. Black, 503 U.S. 222, 230 (1992)).

FN449. See Stringer, 503 U.S. at 232; Clemons v. Mississippi, 494 U.S. 738, 741.

FN450. See Clemons, 494 U.S. at 753-54.

FN451. **Jones, 132 F.3d at 252.** The Fourth Circuit in Tipton employed this form of review. See United States v. Tipton, 90 F.3d 861, 899 (1996).

FN452. **Jones, 132 F.3d at 252.** This standard of harmless error review is the same as the first option of review-reweighing the aggravating and mitigating factors. See id. The Fifth Circuit did not find any fundamental difference in the three options, stating that "all three standards lead to the same conclusion." Id.

FN453. See id.

FN454. See id.

FN455. See id.

FN456. See id.

FN457. Id.

FN458. See id.

FN459. See Stringer v. Black, 503 U.S. 222, 230 (1992).

FN460. Id.

FN461. 90 F.3d 861, 899-901 (4th Cir. 1996).

FN462. See id.

FN463. See supra note 444 and accompanying text.

FN464. See United States v. Tipton, 90 F.3d 861, 899-901 (1996).

FN465. See **United States v. Jones, 132 F.3d 232, 252 (5th Cir. 1998).**

FN466. Stringer v. Black, 503 U.S. 222, 230 (1992).

FN467. See Sochor v. Florida, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring). Justice O'Connor emphasized the importance of thorough analysis and "principled explanation" in harmless error review when she exclaimed:
[W]hile [the harmless error standard of proving beyond a reasonable doubt that the error in question did not contribute to the verdict obtained] can be met without uttering the magic words 'harmless error,' the reverse is not true. An appellate court's bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion.
Id. (citations omitted).

FN468. See **Jones, 132 F.3d at 252**.

FN469. See id.

FN470. United States v. McCullah, 76 F.3d 1087, 1111 (10th Cir. 1996), cert. denied, 117 S. Ct. 1699 (1997) (citing Engberg v. Meyer, 820 P.2d 70, 89 (Wyo. 1991)).

FN471. See id. at 1112 (finding that the jury will imply a quantitative value to each factor).

FN472. Stringer v. Black,, 503 U.S. 222, 232 (1992). Unlike the Fifth Circuit, the Fourth Circuit in Tipton found that the qualitative value of the four overlapping factors was really the same as one factor because the necessity to only find one factor was adequately explained by the judge. See United States v. Tipton, 90 F.3d 861, 899-901 (1996).

FN473. See **Jones, 132 F.3d at 242-48**.

FN474. See **id. at 243**.

FN475. See **id. at 242** (citing United States v. Townsend, 31 F.3d 262, 270 (5th Cir. 1994)).

FN476. See **id. at 243** (citing Townsend, 31 F.3d at 270).

FN477. See id. (citing Townsend, 31 F.3d at 270).

FN478. See id. (citing United States v. Flores, 63 F.3d 1342, 1374 (5th Cir. 1995)).

FN479. See id. at 242-48.

FN480. See id. at 248 (holding that although the district court erred, the error was not "obvious, clear, readily apparent, or conspicuous," so any error was not plain under "plain error review").

FN481. See id. at 242.

FN482. See id. at 243.

FN483. See id. at 242.

FN484. See id. (citing United States v. Townsend, 31 F.3d 262, 270 (5th Cir. 1994)).

FN485. The "and" joining the second and third prongs makes the test conjunctive. See id.

FN486. See id. at 243.

FN487. See id. at 242.

FN488. See id.

FN489. See id. at 242-43 (relying on section 3593(e) of the FDPA). Section 3593(e) provides: "Based upon this consideration, the jury by unanimous vote . . . shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence." 18 U.S.C. § 3593(e) (1994).

FN490. See **Jones, 132 F.3d at 243**.

FN491. See id. (citing 18 U.S.C. § 3593(b)(2)(B)).

FN492. 18 U.S.C. § 3593(b)(2)(B).

FN493. See Memorandum in Support of Motion to Strike Notice of Intention to Seek the Death Penalty as to Defendant Timothy James McVeigh, United States v. McVeigh, No. CR 95-110-A, 1995 WL 697977, at *10 n.7 (W.D. Okla. Doc.) ("The legislative history of the death penalty provisions of § 3591 et seq. is virtually non-existent. There were no committee reports or hearings.").

FN494. See Francis J. McCaffrey, Statutory Construction 35 (1953) ("It is a fundamental principle in the construction of statutes that the whole and every part of the statute must be considered in the determining of the meaning of any of its parts."); see also James Willard Hurst, Dealing with Statutes 60 (1982) ("[T]hose who draft and shepherd through a measure create some pattern of policy, so that there is ground for presuming that their intent in particulars lies in the relations of those particulars to the surrounding pattern.").

FN495. See 18 U.S.C. § 3593(e). This interpretation is in accordance with the "plain meaning rule" which is first and foremost among modes of statutory interpretation. See Abner J. Mikva & Eric Lane, An Introduction to Statutory Interpretation and the Legislative Process, 24 (1997) (noting that the "plain meaning rule is the constitutionally compelled starting place for any statutory construction").

FN496. See 18 U.S.C. § 3593(e) (providing that the jury can recommend a sentence of death, life imprisonment without release, or some other lesser authorized sentence).

FN497. See Mikva & Lane, supra note 495, at 24.

FN498. See 18 U.S.C. § 3593(e).

FN499. See McCaffrey, supra note 494, at 35; Hurst, supra note 494, at 60.

FN500. 18 U.S.C. § 3594.

FN501. See id. § 3593(e).

FN502. Id. § 3594.

FN503. Id. § 3593(e).

FN504. See McCaffrey, supra note 494, at 35 (explaining that statutes must be construed as a whole and that the entire statute must be given effect); see also General Motors Acceptance Corp. v. Whisnant, 387 F.2d 774, 778 (1968) (quoting Harrison v. Walker, 1 Ga. 32, 34 (1896)) (" 'In the construction of a statute, it is the duty of the court, if possible, to give effect to each of its enactments.' ").

FN505. See infra notes 499-522 and accompanying text.

FN506. See 18 U.S.C. § 3594.

FN507. See McCaffrey, supra note 494, at 40 ("Where the legislature uses different language in the same connection, in different parts of the statute, it is presumed that a different meaning and effect was intended."); see also Hurst, supra note 494, at 59 (stating that "particular words or phrases" are read "in the light cast by other parts of the same statute").

FN508. See McCaffrey, supra note 494, at 40 (stating that "[w]here the same language is used in different parts of the same statute in relation to the same subject-matter," the language is to receive the same meaning in each context).

FN509. See 18 U.S.C. § 3594.

FN510. This interpretation is derived by reading all sections of the FDPA in their entirety. See McCaffrey, supra note 494, at 35; Hurst, supra note 494, at 60.

FN511. See 18 U.S.C. § 3594. This interpretation is in accordance with the "plain meaning rule" which is first and foremost among modes of statutory interpretation. See Mikva & Lane, supra note 495, at 24.

FN512. See McCaffrey, supra note 494, at 35; Hurst, supra note 494, at 60.

FN513. See 18 U.S.C. § 3591(a)(2).

FN514. See id. § 3593(e) (referring to section 3592's three lists of statutory aggravating factors relating to the three separate crime types); see also id. § 3593(d) (providing for the court to impose some other sentence if the jury could not find at least one aggravating factor from the three lists in section 3592).

FN515. See id. § 3593(e).

FN516. See Official Transcript of Proceedings, United States v. Nichols, No. 96-CR-68, available in 1998 WL 2518 (D. Colo. Trans.). Judge Matsch of the U.S. District Court for the District of Colorado initially noted the requirement that the jury be unanimous in its finding of at least one aggravating factor of the four statutory aggravating factors relating to intent. See id. at *2. Upon a finding that the jury was hopelessly deadlocked after reasonable deliberation, Judge Matsch discharged the jury with the understanding that he would undertake the sentencing. See id. at *4-6. Unlike the Fifth Circuit in **Jones**, Judge Matsch noted that this would be a final decision as to death. Compare id. at *5, with **United States v. Jones, 132 F.3d 232, 243 (5th Cir. 1998)**.

FN517. See 18 U.S.C. § 3593(d).

FN518. See id. ("If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.").

FN519. See 21 U.S.C. § 848(l) (1994) (using the "otherwise" language as a broad authorization-apparently a default).

FN520. Compare 18 U.S.C. § 3594 (1994), with 21 U.S.C. § 848(l) (1994). It seems to be an easier question when viewing the Drug Kingpin Act's "otherwise" language because while the Drug Kingpin Act still required a unanimous decision for death, it didn't require a unanimous decision for anything else. See 21 U.S.C. § 848(l). In that context, the "otherwise" language was obviously designed to act as a default.

FN521. See McCaffrey, supra note 494, at 35; Hurst, supra note 494, at 60. Looking at the entire context of the Drug Kingpin Act, it is clear that the "otherwise" language was meant very broadly. See 21 U.S.C. § 848(l).

FN522. See McCaffrey, supra note 494, at 62 (stating that weight should be given to "material contained in other acts dealing with the same subject matter").

FN523. See **United States v. Jones, 132 F.3d 232, 243 (5th Cir. 1998)**.

FN524. 18 U.S.C. § 3593(b)(2)(B).

FN525. Id. § 3593(b)(2)(C).

FN526. **Jones, 132 F.3d at 242 n.8**.

FN527. See infra notes 546-47 and accompanying text. Because the substantive law, section 1201, trumps the FDPA, sentencing is determined according to section 1201. See **Jones, 132 F.3d at 248**. Therefore, the FDPA's provision for a "lesser sentence" is inapplicable. See **id. at 247-48**. As the FDPA does not authorize the judge to impose death without a recommendation from the jury, the judge could only impose a sentence of life imprisonment without parole. See id.

FN528. See **Jones, 132 F.3d at 248** (noting that "had the jury recommended some lesser sentence, the court would have been obligated to impose life without the possibility of release as the only authorized lesser sentence"). As the effect of a non-unanimous jury under the analysis proposed by this comment is the same as a recommendation by the jury for some lesser sentence, the district court judge would have automatically imposed a sentence of life without parole. See 18 U.S.C. § 3594.

FN529. See **Jones, 132 F.3d at 242** (outlining the three prong test for abuse of discretion in failing to give requested jury instructions).

FN530. See id.

FN531. See **id. at 243-44**.

FN532. See Appellant's Initial Brief at 34-36, Jones (Nos. 96-10113, 96- 10448).

FN533. See id.

FN534. See id. at 37.

FN535. Id.

FN536. Id. The Fifth Circuit addressed the defendant's points of error in reverse order. The Fifth Circuit divided its analysis into two separate categories. First, the Fifth Circuit entertained a group of the defendant's challenges that tended to show that the district court's instructions caused the jury to believe that a non-unanimous verdict would automatically result in the district court imposing some lesser sentence. See **Jones, 132 F.3d at 243**. Second, the Fifth Circuit reviewed the defendant's challenge contending that the district court's instructions misinformed the jury that it could sentence the defendant to a lesser sentence authorized by law when, in fact, the jury could only sentence the defendant to death or life imprisonment without parole. See id. The Fifth Circuit's subtle reordering and reframing of these issues indicates that the court was straining to avoid a direct confrontation with the defendant's challenges and attempting to bolster what might otherwise appear to be an inadequate response to those challenges. The court's self-serving framework allowed it to address the defendant's threshold point of error-that the jury was improperly led to believe a lesser sentence than life imprisonment was possible-only after it had addressed all related issues of jury confusion. Thereby, the court tacticly avoided a detailed discussion of the possible prejudicial effects carrying over from the district court's erroneous instruction on a lesser sentence.

FN537. See **Jones, 132 F.3d at 243-44**; 18 U.S.C. § 3593(e) (1994).

FN538. See **Jones, 132 F.3d at 248**.

FN539. See **id. at 246** (citing Hicks v. Oklahoma, 447 U.S. 343, 346 (1980)).

FN540. See id. (citing United States v. Flores, 63 F.3d 1342, 1374 (5th Cir. 1995)).

FN541. See id. at 243 (citing Fed. R. Crim. P. 52(b)).

FN542. See id. (citing United States v. Olano, 507 U.S. 725, 732-35 (1993)).

FN543. Id.

FN544. See id. at 248.

FN545. See id. at 247 (citing United States v. Branch, 91 F.3d 699, 738- 40 (5th Cir. 1996)). The court analogized the FDPA to a sentence enhancement provision by finding that (1) the FDPA did not apply unless the defendant could be convicted under another section of the United States Code, (2) the FDPA only adds the sentence of death to the applicable sentences available under the other sections of the Code, and (3) the FDPA's main purpose is to provide guidelines for the sentencing hearing. See id.

FN546. Id. at 248.

FN547. See id. at 247-48 (citing 18 U.S.C. § 1201 (1994)).

FN548. See id. at 246.

FN549. See id. at 248.

FN550. See id.

FN551. Id. at 243 (citing United States v. Olano, 507 U.S. 725, 732-35 (1993)).

FN552. See id. at 248.

FN553. Id.

FN554. See id. at 243 (citing Olano, 507 U.S. at 732-35).

FN555. See Edmund F. McGarrell, The Misperception of Public Opinion Toward Capital Punishment: Examining the Spuriousness Explanation of Death Penalty Support, Am. Behav. Scientest, Feb. 1, 1996, at 500, available in 1996 WL 12941064 (showing that the death penalty will be imposed more often if the jury thinks that a defendant could receive some other, less harsh penalty; whereas the death penalty will be imposed less often if the jury has the option to impose a harsh, meaningful alternative); see also Appellant's Initial Brief at 34-37, Jones (Nos. 96-10113, 96-10448) (showing that two jurors supported a sentence of death because they believed that the judge could impose a lesser sentence in the event the jury could not reach a unanimous verdict).

FN556. See Appellant's Initial Brief, at 31-32, Jones (Nos. 96-10113, 96- 10448).

FN557. See Jones, 132 F.3d at 244.

FN558. Id. (emphasis added).

FN559. See id. at 244-45.

FN560. Id. at 244.

FN561. See id. at 245 (citing Allen v. United States, 164 U.S. 492, 501- 02 (1896)). But cf. Gregg v. Georgia, 428 U.S.153, 190 (1976) (stating that the jury should be adequately informed of all necessary information). Recently, the Supreme Court issued an opinion which implies that the Supreme Court may soon require juries to be informed of

whether the defendant is "parole ineligible." See Brown v. Texas, 118 S. Ct. 355, 55-56 (1997); see also Amanda Dowlen, Comment, An Analysis of Texas Capital Sentencing Procedure: Is Texas Denying its Capital Defendants Due Process by Keeping Jurors Uninformed of Parole Eligibility?, 29 Tex. Tech L. Rev. 1043 (1998) (arguing that Texas law forbidding the consideration of parole eligibility in capital cases violates the defendant's constitutional right to due process).

FN562. See Jones, 132 F.3d at 245 (citing 18 U.S.C. § 3593(e) (1994)); see also id. at 243 (providing that a non-unanimous jury results in a "hung jury" with no verdict rendered, and it requires a new jury to be impaneled for a second sentencing hearing). But cf. supra notes 487-525 and accompanying text (hypothesizing that the FDPA does not require a unanimous jury, but defers to the district court judge in the event of non-unanimity).

FN563. See Jones, 132 F.3d at 245. The Louisiana Supreme Court found that juries must be informed of the consequences of failing to achieve a unanimous verdict. See State v. Williams, 392 So. 2d 619, 634-35 (La. 1980).

FN564. See Jones, 132 F.3d at 244-45.

FN565. See id. at 244-45.

FN566. Id. at 245.

FN567. See id. at 245-46.

FN568. See id. The court noted the defendant's argument that the Federal Rules of Evidence were inapplicable to a sentencing hearing. See id. at 246. However, the court found that even if the Federal Rules were not applicable, the reliability purpose of the Federal Rules was applicable. See id. (citing Lockett v. Ohio, 438 U.S. 586, 604 (1978)).

FN569. See id.

FN570. See id. at 244-46.

FN571. See id. at 243-44.

FN572. Id. at 244.

FN573. Although the jury affidavits are barred as evidence, they clearly show that "reasonable jurors" could have believed this way because two jurors actually did believe this way. See supra notes 567-70 and accompanying text; Appellant's Initial Brief [illegible] nes (Nos. 96-10113, 96-10448).

FN574. See Jones, 132 F.3d at 239-42.

FN575. See id. at 241-42.

FN576. See id.

FN577. See id.

FN578. Id. at 248.

FN579. See id. at 245.

FN580. See id. at 252.

FN581. See Gregg v. Georgia, 428 U.S. 153, 206 (1976); Barclay v. Florida, 463 U.S. 939, 991 (1983) (J. Blackmun,

dissenting). Justice Blackmun, dissenting in Barclay, eloquently summarized the importance of solid death penalty jurisprudence:

Like Justice Stevens, I cannot "applaud" the procedures and appellate analysis that have led to petitioner's death sentence. Like the Court, however, I cannot "applaud" the undertakings of petitioner and his companions that led to their victim's death in the Jacksonville area that night in June 1974. But when a State chooses to impose capital punishment, as this Court has held a State presently has the right to do, it must be imposed by the rule of law. Justice Marshall's opinion convincingly demonstrates the fragility, in Barclay's case, of the application of Florida's established law. The errors and missteps-intentional or otherwise-come close to making a mockery of the Florida statute and are too much for me to condone. Petitioner Barclay, reprehensible as his conduct may have been, deserves to have a sentencing hearing and appellate review free of such misapplication of law, and in line with the pronouncements of this Court. The final result reached by the Florida courts, and now by this Court, in Barclay's case may well be deserved, but I cannot be convinced of that until the legal process of the case has been cleansed of error that is so substantial. The end does not justify the means even in what may be deemed to be a "deserving" capital punishment situation. I therefore dissent.

Id. (citations omitted).

FN582. See Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (referring to a convicted criminal's right to an individualized sentence of death, meaning that the jury must look at the characteristics of the crime as well as the record and characteristics of the defendant).

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